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A
Supplement
TO THE
REPORTS IN CHANCERY

OF
FRANCIS VESEY, Senior, Esq.
BARRISTER AT LAW, AND LATE ONE OF THE MASTERS OF THE
HIGH COURT OF CHANCERY IN IRELAND,
DURING THE TIME OF
LORD CHANCELLOR HARDWICKE:

COMPRISING
CORRECTIONS OF STATEMENT AND EXTRACTS OF THE
DECREES AND ORDERS FROM THE REGISTRAR'S BOOKS,
REFERENCES TO THE CASES CITED,
SUBSEQUENT DETERMINATIONS ON THE SEVERAL POINTS,
SOME MANUSCRIPT CASES,
NEW MARGINAL NOTES,
AND A COPIOUS INDEX.

—◆—
BY **ROBERT BELT, Esq.**
OF THE INNER TEMPLE, BARRISTER AT LAW, AND A COMMISSIONER
OF BANKRUPTS.

—◆—

THE SECOND EDITION,
WITH CONSIDERABLE ADDITIONS.

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DEDICATION TO THE FIRST EDITION.

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JOHN LORD ELDON,

LORD HIGH CHANCELLOR,

&c. &c. &c.

YOUR Lordship's having honoured this Production with so peculiar a sanction, will ever be to me a source of the greatest satisfaction.

I have certainly endeavoured with all industry to make it useful ; and it is that endeavour alone which can embolden me to hope that its defects may be treated with indulgence.

Your Lordship and the Profession are aware that the valuable Reports, to which my Work is a Supplement, have long required an attempt of the kind ; and hence it has for many years been my employment to supply their deficiencies.

In this pursuit I have frequently had to trace several Causes, through a long course of time, to their ultimate result ; and I have enriched my humble labours with the Language of the Court,

by giving Extracts from its Decrees and Orders at one of its best periods.

In doing this, my hope has been, that the double purpose may be answered of illustrating the Cases with which those Decrees and Orders are connected, and of affording useful Precedents, that the Bar may be facilitated in the preparing of minutes to carry into effect the Judgments of the Court in other instances.

I have likewise inserted a few Manuscript Cases, which I trust will add to the value of the Work.

Your Lordship's gracious desire, "that the publication of my Work might be *a Gift from yourself to the Profession,*" will never be effaced from my grateful remembrance.

From your Lordship's liberality the Publication is derived; and to your Lordship the Work is inscribed.

I have the Honour to be,

MY LORD,

With the utmost respect,

Your Lordship's ever faithful and

Obliged humble Servant,

ROBERT BELT.

15, *New Boswell Court, Lincoln's Inn,*
March 27, 1817.

*The Author is unwilling to dismiss his Work,
without Acknowledgments to the Registrars of the
Court, and the Gentlemen in the Report Office, for
the Facilities always afforded by them to every
Member of the Bar in the Investigation of its
Records.*

**15, New Boswell Court, Lincoln's Inn,
31st March, 1817.**

TABLE

OF

THE CASES.

N. B. "*Versus*" always follows the name of the Plaintiff.

A.		Page
		391, 414, 416, 418, 449, 452, 453, 458
AIREY <i>and</i> Ellison	75, 439	Anson <i>and</i> Tudor - 442
Alexander <i>v.</i> Alexander	- 456	Archer <i>v.</i> Pope - 422
Allanson <i>v.</i> Clitherow	- 23	Ardovin <i>and</i> Duhamel - 332
Allen <i>and</i> Hill	- 63	Arnold <i>v.</i> Chapman - 74
Allen <i>v.</i> Papworth	- 91	Arnold <i>and</i> Johnson - 99
Allen <i>v.</i> Poulton	- 78	Arnott <i>v.</i> Biscoe - 69
Alleyn <i>v.</i> Alleyn	- 280	Artis <i>Ex parte</i> - 415
Amsbury <i>v.</i> Brown	- 213	Ashly <i>v.</i> Baillie - 382
Anandale M. <i>v.</i> Marchioness	- 385	Askew <i>v.</i> Poulterers' Company - 299
Ancaster, D. of, <i>and</i> E. Tyrconnel	- 417	Astley <i>v.</i> Powis - 213
Anderson <i>and</i> Rudstone	- 393	Aston <i>v.</i> Aston - 142, 186
Andrew <i>v.</i> Clark	- 332	Athol, D. of, <i>and</i> E. of Derby - 114, 367, 377
Andrew <i>and</i> Maddison	- 46	Atkinson <i>and</i> Grayson - 404
Andrews <i>and</i> Attorney-General	- 121	Attorney-General <i>v.</i> Andrews - 121
Anonymous	212, 271, 275, 308,	Attorney-General <i>v.</i> Corporation of Bedford - 417

Table of the Cases.

	Page		Page
Attorney-General v. Bowles	426	Baker v. Wind	90
Attorney-General v. Brereton	396	Baldwin and Garth	456
Attorney-General v. Cook	363	Baldwin and Lloyd	104
Attorney-General v. Day	121	Ball and Carte	4
Attorney-General v. Duplessis	366	Ballard and Hill	56
Attorney-General v. Harrow school	429	Baltimore, Lord, and Penn	205
Attorney-General v. Lloyd	29	Bank of England and Glynn	281
Attorney-General v. Meyrick	282	Banks v. Denshire	48
Attorney-General v. Middleton	374	Barbut and Tilburgh	67
Attorney-General v. Parker	36	Barnesly v. Powell	77, 152
Attorney-General v. Smart	53	Barret v. Beckford	230
Attorney-General v. Scott	194	Barwell v. Parker	376
Attorney-General v. Talbot	58	Bateman and Cox	269
Attorney-General v. Whorwood	274	Bath, E. of, v. E. of Bradford	443
Attorney-General v. Wycliffe	61	Bax, Ex parte	386
Avelyn v. Ward	195	Baxter v. Knollys	216
Aylet v. Easy	376	Beane and Ithell	119
Ayres v. Willis	127	Beard v. E. Powis	387
		Beard v. Travers	162
		Beaumont v. Thorpe	25
		Beckford and Barret	230
		Beckford v. Tobin	161
		Bedford, D. of, v. Coke	310
		Bedford Corporation and Attorney-Gen.	417
		Belt v. Mitchelson and Belt	238
		Benson v. Dean and Chapter of York	67
		Bentham and Ryder	253
		Berkeley L. Lessees of, and Morris	404
		Berkley v. Ryder	424
		Beezly and Welford	6
		Bickham v. Cross	409
		Bicknell v. Brereton	458
		Billon v. Hyde	167
		Bingham v. Bingham	81
			Birkhead

Table of the Cases.

	Page		Page
Birkhead and Wortley	- 440	Buden v. Dore	- - 400
Biscoe and Arnott	- 69	Bulkely and Travers	- 180
Biscoe and Hylton	- 369	Bullock v. Stones	- 419
Bishop v. Church	- 303, 383	Burleigh v. Pearson	- 151
Bishop v. Willis	- 308	Burnet v. Mann	- - 88
Blackerby and Schellinger	172	Bush v. Dalway	- - 20
Blackman and Wyth	- 113	Butterfield v. Butterfield	- 83
Blanchet v. Foster	- 357	Buxton v. Snee	- - 86
Blinkhorn v. Feast	- 276	Byas v. Byas	- - 333
Blower v. Morret	- 393		
Blunt v. Cumyns	- 375		C.
Boiton and Marasco	- 308		
Boon v. Cornforth	- 364		
Boughton v. Boughton	- 259		
Bowes and Medlicott	- 116		
Bowles and Attorney General	- - - 426	Campbell and E. I. Company	- - - 196
Brabson and Child	- 307	Cann v. Cann	- - 418
Bradford, E. of, and E. of Bath	- - - 443	Carte v. Ball	- - 4
Bradford and Seed	- 220	Carter v. Carter	- 98
Bradley v. Garforth	- 461	Chaloner and Horsely	- 295
Braggington and Sansum	202	Chamberlain and Pearce	279
Brereton and Attorney-General	- - - 396	Champ v. Moody	- 408
Brereton and Bicknell	- 458	Chaney v. Fenhoulet	- 358
Brereton v. Tamberlaine	- 396	Chapman and Arnold	- 74
Bridge and Sewell	- 160	Chapman v. Hart	- 146
Bridgman v. Green	- 452	Chapman and Oates	253, 302
Bridgewater, D. of, v. Egerton	- - - 313	Chapman and Peat	- 252
Britnell and Thomas	- 372	[miscalled Prat v. Chapman]	
Brown and Amesbury	- 213	Chapman v. Smith	- 417
Brown v. Pring	- - 192	Cheshire and Evans	- 317
Broughton and Wharam	- 107	Chesterfield, E. of, v. Janssen	- - 314
Brownsword v. Edwards	- 353	Chetwynd v. Lindon	- 403
Bryant v. Speke	- 100	Chicot v. Lequesne	- 372
Buckley and Earl of Stafford	- - - 340	Child v. Brabson	- 307
		Child and Walmsley	- 171
		Chilliner v. Chilliner	- 422

Holmondeley

Table of the Cases.

	Page		Page
Cholmondeley and Pitt -	438	Cox and D'Aranda -	1
Church and Bishop 303,	383	Cox and Grigby -	229
City of London v. Nash	14	Cowlade c. Cornish -	360
Clark and Andrew -	332	Cray v. Manfield -	178
Clark v. Guise -	447	Cross and Bickham -	409
Clark and Flanders -	12	Cumyns and Blunt -	375
Clarke v. Samson -	71	Cunningham v. Moody -	105
Clark v. Thorp -	348		
Clavering v. Clavering -	348	D.	
Clavey v. Hunt -	269	Dalway and Bush -	20
Clayton and Kirby -	351	Daly and Legard -	112
Clitherow and Allanson -	23	D'Aranda and Lee -	1
Clough and Jones -	380	Darley and Rattray -	394
Cloyne, Bishop, v. Young	300	Davies and Bailly -	63
Cocking v. Pratt -	187	Davies and Owen -	61
Codrington and William- son - - -	226	Dawson and Row -	168
Coke and Duke of Bed- ford - - -	310	Day and Attorney-Gene- ral - - -	121
Cole v. Gibson -	222	Day and Hawkins -	109
Coleman v. Seymour -	118	Deacon and Stroud -	32
Collier and Elliot -	17	Delaval and Pawlet -	459
Conway and Stapleton -	197	Denshire and Banks -	48
Conyngham v. Conyng- ham - - -	232	Denton v. Shellard -	351
Cook and Attorney-Gene- ral - - -	363	Derby, E. of, v. D. of A- thol - - -	114, 367, 377
Cook and East -	277	Derby, E. of, v. Bp. of So- dor and Man -	377
Cook and Flight -	448	Dillingham and Morris -	339
Cook and Ogle -	106	Dixon and Baines -	35
Cookes v. Hellier -	133	Dixon v. Parker -	346
Cookson and Whelpdale	8	Doddington v. Hallett -	216
Cornforth and Boon -	364	Donegal's, Lord, Case -	389
Cornish and Cowlade -	360	Door v. Geary -	139
Cornwal v. Wilson -	225	Dore and Buden -	400
Cory v. Cory -	19	Drinkwater v. Falconer -	451
Cotton and Garth -	244		
Cotton v. Shepherd -	33		
Coxe v. Bateman -	269		

Table of the Cases.

	Page
Dudman <i>and</i> L. Montague	387
Duhamel <i>v.</i> Ardovin	- 332
Danne <i>and</i> Parsons	- 291
Duplessis, <i>Ex parte</i>	- 426
Duplessis <i>and</i> Attorney-General	- 366
Duplessis <i>and</i> Knight	165, 379
Durham, Dean of	- 212
Durour <i>v.</i> Motteux	- 165

E.

Earl <i>and</i> Senhouse	- 401
East <i>v.</i> Cook	- 277
East India Comp. <i>v.</i> Campbell	- 136
East India Company <i>and</i> Vanessen	- 181
Easy <i>and</i> Aylet	- 376
Edwards <i>and</i> Brownsword	353
Edwards <i>and</i> How	- 418
Effingham, Lord, <i>and</i> E. of Portsmouth	- 28, 201
Egerton <i>and</i> D. of Bridgewater	- 313
Elliot <i>v.</i> Collier	- 17
Elliot <i>v.</i> Jekyll	- 462
Ellison <i>v.</i> Airey	- 75, 439
Elton <i>v.</i> Elton	- 5
Emperor <i>v.</i> Rolfe	- 117
Evans <i>v.</i> Chesshire	- 317
Evans <i>and</i> Richards	- 33
Exel <i>v.</i> Wallace	- 312, 373
Eyre <i>v.</i> Eyre	- 297

F.

	Page
Falconer <i>and</i> Drinkwater	451
Farrel <i>and</i> Whitmel	- 140
Farrer <i>and</i> Vaughan	- 341
Faure <i>and</i> Miller	- 64
Fawcet <i>v.</i> Lowther	- 368
Fawcet <i>and</i> Whitfield	- 180
Feast <i>and</i> Blinkhorn	- 276
Featherstonhaugh <i>and</i> Mitford	- 399
Fenhoulet <i>and</i> Chancey	- 358
Fenhoulet <i>v.</i> Passavant	- 274
Finch <i>v.</i> Finch	- 415
Flanders <i>v.</i> Clark	- 12
Flight <i>v.</i> Cook	- 448
Flower <i>v.</i> Herbert	- 374
Fonnereau <i>v.</i> Fonnereau	76
Foster <i>and</i> Blanchet	- 357
Foster <i>and</i> Shish	- 66
Fournier <i>and</i> Bp. of Winchester	- 401
Fox <i>and</i> Revel	- 360
Fuller <i>v.</i> Hooper	- 352
Furness, &c. <i>and</i> Travers	270

G.

Gage <i>v.</i> Lord Stafford <i>and</i> Furness	- 254
Gage <i>v.</i> Lady Stafford	- 430
Gale <i>and</i> Bailis	- 283
Gammon <i>v.</i> Stone	- 170
Gardner	

Table of the Cases.

	Page		Page
Gardner, <i>Ex parte</i>	- 460	Haddock and Ogle	- 90
Garforth v. Bradley	- 461	Hallet and Pinnel	- 364
Garth v. Baldwin	- 456	Hallet and Doddington	- 216
Garth v. Cotton	- 244	Hampshire v. Pierce	- 346
Garvan and Roach	- 88	Hand and Oldham	- 356
Gason v. Wordsworth	- 373,	Hare v. Rose	- 435
	377	Hargrave and Sedgwick	285
Geary and Door	- 139	Harman and Wilson	- 461
Geary and Godolphin	- 22	Harris and Whithorn	- 423
Gee and Robinson	- 139	Harrison v. Rumsey	- 413
Gibson and Cole	- 222	Harrison v. Southcote	- 386
Gibson v. Lord Montfort	214	Harrow school and Attor-	
Gilbert and Hele	- 397	ney-General	- 429
Glynn and Bank of Eng-		Hart and Baker	- 26
land	- 281	Hart and Chapman	- 146
Goodinge v. Goodinge	- 128	Harwood and Jacomb	- 358
Godolphin v. Geary	- 22	Hawes v. Hawes	- 15
Godolphin v. Godolphin	21	Hawkins v. Day	- 109
Godolphin, L. and D. of		Hawkins v. Obeen	- 435
Marlborough	- 392	Hawkins v. Penfold	- 428
Godolphin, E. of, v. Pen-		Hayward and White	- 406
neck	- 361	Head v. Head	- 17
Goodwyn v. Goodwyn	- 122	Hearle v. Greenbank	- 161
[mispaged]	- 222	Heath and Oke	- 84
Gould and Nichols	- 394	Hele v. Gilbert	- 397
Gower v. Mainwaring	- 298	Hellier and Cookes	- 133
Graham v. Graham	- 141	Herbert and Flower	- 374
Granville, E. of, and Wors-		Heurtly and Stones	- 98
ley	- 375	Higham, <i>Ex parte</i>	- 441
Grayson v. Atkinson	- 404	Hill v. Allen	- 63
Gregor v. Molesworth	- 306	Hill v. Ballard	- 56
Green and Bridgeman	- 452	Hill and Lewis	- 148
Green v. Rutherford	- 212	Hinton v. Hinton	- 454
Greenbank and Hearle	- 161	Hithcox and Underwood	151
Griffith v. Hood	- 403		
Griffith and Owen	- 137		
Grigby v. Cox	- 229		
Guise and Clark	- 447		

Table of the Cases.

	Page		Page
Hodges and Mogg -	284	Johnson v. Mills -	151
Hodgson and Rawson -	37	Johnson v. Peck -	407
Holmden and Lomax -	160	Johnson v. Smith -	162
Hood and Griffith -	403	Jones v. Clough -	380
Hooper and Fuller -	352	Jones v. Lewis -	351
Hopkins v. Hopkins -	145		
Hornsby and Meriton -	39	K.	
Horsley v. Chaloner -	295		
How v. Edwards -	418		
How v. Weldon -	418		
Hubert v. Parsons -	357	Kaines and Orr -	343
Hucks v. Hucks -	438	Kelly and Jackson -	365
Hughes v. Trustees of Mor-		Kemp v. Mackrell -	441
den Coll. -	108	Kemp v. Squire -	116
Hunt and Clavey -	269	Kemp v. Westbrook -	149
Hyde and Dillon -	167	Kenegal and Reach -	80
Hylton v. Biscoe -	369	Kettericke and Thomas -	168
Hylton v. Hylton -	427	Kilburne and Theebridge -	350
Hylton and Ramsden -	369	King v. Philips -	131
I.		Kingsley and Roberts -	135
		Kinsey v. Kinsey -	441
Ithell v. Beane -	119	Kirby v. Clayton -	351
Ivat and Wilson -	335	Kirkham v. Smith -	141
Ivie and Taner -	407	Knight v. Duplessis -	165, 379
Jacomb v. Harwood -	358	Knollys and Baxter -	216
Jackson v. Jackson -	120		
Jackson v. Kelly -	365	L.	
Jackson v. Langford -	458		
Janssen and Earl of Ches-			
terfield -	314	Lacam v. Mertins -	162
Jekyll and Elliot -	462	Ladbroke and Tomkyns -	444
Jekyll and Williams -	462	Langford and Jackson -	458
Jenkins v. Jenkins -	264	Lanoe and Parsons -	110
Jenner v. Wilkins -	112	Lee v. D'Aranda and Cox -	1
Johnson v. Arnold -	99	Leech v. Trollop -	458
		Leeds, D. of, v. Powell -	100
		Lefarrant	

Table of the Cases.

	Page		Page
Lefarrant v. Spencer	- 70	Morasco v. Boiton	- 308
Lefebure v. Worden	- 285	Marlborough, D. of, v. L.	
Legard v. Daly	- 112	Godolphin	- 292
Legal v. Miller	- 367	Marryat v. Townly	- 73
Leigh v. Thomas	- 371	Martin v. Martin	- 118
Leman v. Newnham	- 40	Matthews, <i>Ex parte</i>	- 363
Le Neve v. Le Neve	- 49	Mathews v. Mathews	- 455
Lequesne and Chicot	- 372	May and Plummer	- 196
Lewin v. Lewin	- 392	Meath, E. of, and Weaver	306
Lewis v. Hill	- 148	Medlicott v. Bowes	- 116
Lewis and Jones	- 351	Mendes v. Mendes	- 67
Lewis v. Nangle	- 398	Meriton v. Hornsby	- 39
Lewis and Taylor	- 307	Merry and Scott	- 3
Liddel and Welford	- 388	Mertins and Lacan	- 162
Lindon and Chetwynd	- 403	Meliorucchy v. Melioruc-	
Lloyd and Attorney-Gener-		chy	- 274
ral	- 29	Meyrick and Attorney-Ge-	
Lloyd v. Baldwin	- 104	neral	- 282
Lloyd and Pryse	- 221, 384	Middleton and Attorney-	
Lloyd v. Tench	- 345	General	- 374
Loder v. Loder	- 424	Miller v. Turner	- 64
Lomax v. Holmden	- 160	Miller v. Faure	- 64
London City v. Nash	- 14	Miller and Legal	- 367
Longuet v. Scawen	- 191	Milner v. Milner	- 74
Lowfield and Townsend	- 30	Mills and Johnson	- 151
Lowther and Fawcet	- 368	Mitchel v. Neal	- 462
		Mitchelson and Belt	- 238
		Mitford v. Featherston-	
		haugh	- 399
		Mogg v. Hodges	- 284
		Molesworth and Gregor	- 306
		Monk and Peacock	82, 342
		Montague, Lord v. Dud-	
		man	- 387
		Montfort, L. and Gibson	214
		Moody and Champ	- 408
		Moody and Cunningham	- 105
		Moore v. Moore	- 445
		Morden Coll. and Hughes	108
			Morret

Table of the Cases.

	Page		Page
Morret and Blower	- 393	Parker and Dixon	- 346
Morris v. Lessees of Lord Berkeley	- 404	Parrot and Priest	- 330
Morris v. Dillingham	- 339	Papworth and Allen	- 91
Motteux and Durour	- 165	Parker and Attorney-General	- 36
Moxton and Sibthorp	- 39	Parker and Barwell	- 379
		Parker v. Philips	- 247
		Parrot and Peck	- 134
		Parson v. Lanoe	- 110
		Parsons v. Dunne	- 291
		Parsons and Hubert	- 357
		Passavant and Fenhoullet	274
		Pawlet v. Delaval	- 459
		Peacock v. Monk	82, 342
		Pearce v. Chamberlain	- 279
		Pearson and Burleigh	- 151
		Peat v. Chapman [miscalled Pratt v. Capman]	- 252
		Peck and Johnson	- 407
		Peck v. Parrot	- 134
		Penfold and Hawkins	- 428
		Penn v. Lord Baltimore	205
		Penneck and E. Godolphin	- 361
		Philips and King	- 131
		Philips and Taylor	124 [mispaged 224], 272
		Philips and Parker	- 247
		Pierce and Hampshire	- 346
		Piers v. Piers	- 231
		Pierse and Sayer	- 132
		Pinnel v. Hallet	- 364
		Pitcairne v. Ogbourne	- 384
		Pitt v. Cholmondeley	- 438
		Pitt v. Wortley	- 98
		Plummer v. May	- 196
		Pole v. Pole	- 55
		Pomfret, E. of, v. Lord Windsor	- 411
			Pope
N.			
Nangle and Lewis	- 398		
Nash and City of London	14		
Neal and Mitchel	- 462		
Newnham and Leman	- 40		
Nichols v. Gould	- 394		
North, Lord, and Guildford v. Purdon	- 416		
O.			
Oates v. Chapman	253, 302		
Obeen and Hawkins	- 435		
Ogbourne and Pitcairne	- 384		
Ogle v. Cook	- 106		
Ogle v. Haddock	- 90		
Oke v. Heath	- 84		
Oldham v. Hand	- 356		
Orr v. Kaines	- 343		
Owen v. Davies	- 61		
Owen v. Griffith	- 137		
P.			
Paine and Baker	- 210		
Paine and Ridout	- 13		

Table of the Cases.

	Page		Page
Pope and Archer	- 422	Rigden v. Vallier	- 355
Portsmouth, Earl of, v. Lady Suffolk and Lord Effingham	- 28, 201	Roach v. Garvan	- 88
Potter v. Potter	- 147, 202	Roberts v. Kingsley	- 135
Poulterers' Company and Askew	- 299	Robinson v. Gee	- 139
Poulton and Allen	- 78	Robinson v. Robinson	- 347
Powel and Barnesly	77, 152	Rochfort and Taylour	- 365
Powell and Duke of Leeds	100	Rolfe and Emperor	- 117
Powis and Astley	- 213	Rook v. Worth	- 211
Powis, E. of, and Beard	- 387	Rose and Hare	- 435
Pratt and Cocking	- 187	Row v. Dawson	- 168
Preswick and Walker	- 449	Rowles and Ryall	- 176
Priest v. Parrot	- 330	Rudstone v. Anderson	- 393
Prime v. Stebbing	- 390	Rumsey and Harrison	- 413
Pring and Brown	- 192	Rutherforth and Green	- 212
Pryse v. Lloyd	- 221, 384	Ryall v. Rowles	- 176
Purdon and L. North and Guildford	- 416	Ryder v. Bentham	- 253
Pyke v. Pyke	- 177	Ryder and Berkley	- 424
Pyot v. Pyot	- 169		
		S.	
Q.		Salkeld v. Science	- 303
Quincey and Scrafton	- 391	Samson v. Clarke	- 71
		Sandford and Willet	- 106
R.		Sands v. Sands	- 216
Ramsden v. Hylton	- 369	Sansum v. Braggington	- 202
Ratray v. Darley	- 394	Saville v. Tankred	- 72
Rawson and Hodgson	- 37	Sayer v. Pierse	- 132
Reech v. Kennegall	- 80	Scawen and Longuet	- 191
Revel v. Fox	- 360	Scawen and Swynfen	- 70
Revel v. Watkinson	- 68	Schellinger v. Blackerby	- 172
Richards v. Evans	- 33	Science and Salkeld	- 303
Ridout v. Paine	- 13	Scott and Attorney-Gener- al	- 194
		Scott v. Merry	- 3
		Scrafton v. Quincey	- 391
		Sedgwick v. Hargrave	- 285
		Seed v. Bradford	- 220
		Sen-	

Table of the Cases.

	Page		Page
Senhonse v. Earl	- 401	Stebbing and Prime	- 390
Sewell v. Bridge	- 160	Stephens v. Trueman	- 54
Seymour and Coleman	- 118	Stockwell v. Terry	- 76
Shallet and Ward	- 268	Stone and Gannnon	- 170
Shellard and Denton	- 351	Stonehouse and Southby	446
Shepherd v. Cotton	- 33	Stones and Bullock	- 419
Shish v. Foster	- 66	Stones v. Heurtly	- 98
Short and Tickel	- 350	Stroud v. Deacon	- 32
Sibthorp v. Moxton	- 39	Suffolk, Lord, and E. of	
Skip, Ex parte	- 414	Portsmouth	- 28
Skipp and West	- 135, 210	Swynfen v. Scawen	- 70
Sleech v. Thorrington	- 437		
Smart and Attorney-General	- 53	T.	
Smith and Chapman	- 417	Talbot and Attorney-General	- 58
Smith and Kirkham	- 141	Tamberlaine and Brereton	396
Smith and Johnson	- 162	Taner v. Ivie	- 407
Snee and Buxton	- 86	Tankred and Saville	- 72
Sodor and Man, Bishop of,		Taylor v. Lewis	- 307
and E of Derby	- 377	Taylor v. Philips	- 124
Southby v. Stonehouse	- 446	[mispaged 224],	- 272
Southcot, Ex parte	- 389	Taylour v. Rochfort	- 365
Southcote and Harrison	- 386	Tench and Lloyd	- 345
Sparks and Woffington	- 440	Terry and Stockwell	- 76
Speke and Bryant	- 100	Teynham, Lord, v. Webb	344
Spencer and Bagshaw	- 85	Theebridge v. Kilburne	- 350
Spencer and Le Farrant	- 70	Thomas v. Britnell	- 372
Sperling v. Toll	- 52	Thomas v. Kettericke	- 163
Squire and Kemp	- 116	Thomas and Leigh	- 371
Stace v. Mabbot	- 429	Thorne v. Watkins	- 280
Stafford, Earl of, and Gage	254	Thorpe and Clark	- 348
Stafford, Earl of, v. Buckley	- 340	Thorpe and Beaumont	- 25
Stafford, Lady, and Gage	430	Thorrington and Sleech	- 437
Stafford, Earl of, and Travors	- 270	Tickel v. Short	- 350
Stapleton v. Conway	- 197	Tilburgh v. Barbut	- 67
Statham and L. Uxbridge	44	Tobin and Beckford	- 161
Staveland and L. Uxbridge	44	b	Toll

Table of the Cases.

	Page		Page
Toll and Sperling -	52	Vaughan v. Farrer -	341
Tomkyns v. Ladbroke -	444	Verney v. Verney -	199
Townly and Marryat -	73	Vivian and Trevanion -	397
Townsend v. Lowfield -	30		
Townshend, Lord, v. Windham -	254	W.	
Travers and Beard -	162		
Travers v. Bulkely -	180		
Travers v. Earl of Stafford, &c. -	270	Walker v. Preswick -	449
Trevanion v. Vivian -	397	Walker v. Walker -	43
Trollop and Leech -	458	Wallace and Exel -	312, 373
Troughton v. Troughton -	66	Walmsley v. Child -	171
Trueman and Stephens -	54	Watkins, <i>Ex parte</i> -	409
Tudor v. Anson -	442	Watkins and Thorne -	280
Turner and Miller -	64	Watkinson and Revel -	68
Turner and Ward -	398	Ward and Avelyn -	195
Tyrconnel, E. v. D. of Ancaster -	417	Ward v. Shallet -	268
		Ward v. Turner -	398
U.		Weaver v. Earl of Meath -	306
		Webb and L. Teynham -	344
Underwood v. Hithcox -	151	Weldon and How -	418
University Coll. and Whorwood -	247	Welford v. Bezely -	6
Uxbridge, Lord, v. Statham -	44	Welford v. Liddel -	388
Uxbridge, Lord, v. Staveland -	44	West v. Skipp -	135, 210
		Westbrook and Kemp -	149
V.		Wharam v. Broughton -	107
		Whelpdale v. Cookson -	8
Vallier and Rigden -	355	White v. Hayward -	406
Vane v. Vane -	45	Whitfield v. Fawcet -	180
Vanessen v. E. J. Company -	181	Whithorn v. Harris -	423
		Whitnel v. Farrel -	140
		Whorwood and Attorney-General -	247
		Whorwood v. University College -	247
		Wilks and Jenner -	112
		Willot v. Sandford -	106
		Williams v. Jekyll -	462
		Williamson, <i>Ex parte</i> -	354
		Williamson	

Table of the Cases.

	Page		Page
Williamson v. Codrington	226	Worth and Rook	- 211
Willis and Ayers	- 127	Wortley v. Birkhead	- 440
Willis and Bishop	- 308	Wortley v. Pitt	- 98
Willoughby v. Willoughby	463	Wright, <i>Ex parte</i>	- 275
Wilson and Cornwal	- 225	Wright v. Wright	166, 192
Wilson v. Harman	- 461	Wycliffe and Attorney-	
Wilson v. Ivat	- 335	General	- 61
Winchester, Bishop of, v.		Wyldman, <i>Ex parte</i>	- 308
Fournier	- 401	Wyth v. Blackman	- 103
Wind and Baker	- 90		
Windham and Lord Towns-			
hend	- 254		
Windsor, Lord, and E.		Y.	
Pomfret	- 411		
Woffington v. Sparks	- 440		
Worden and Lefebure	- 285	York, D. and Chapter of,	
Wordsworth and Gason	373, 377	and Benson	- 67
Worsley v. Earl of Gran-		Young and Bishop of	
ville	- 375	Cloyne	- 300

ERRATA.

Mispageing after page 121 ; instead of 222, 223, 224, read 122, 123, 124.
Page 252, for *Prat v. Chapman*, read *Peat v. Chapman*.

SUPPLEMENT
TO THE
REPORTS IN CHANCERY,
OF
FRANCIS VESEY, Senior.

LEE *versus* D'ARANDA [and Cox] Hil. Vac.
1746-7.

(*Reg. Lib. 1746. B. fol. 359.*)

VOL. I.

Page 1

S.C. 3 Atk. 419.

NOTES AND OBSERVATIONS.

THE report in *Atkins* states the Covenants nearly *verbatim* with the Registrar's Book.

They were as follows : " In consideration of the intended marriage, and of the marriage portion of *Martha D'Aranda*, and for the making a provision for the said *Martha*, *Charles Henry Lee* doth covenant that he will in his lifetime, either by his last will or by some good and sufficient assurance in the law, grant to *Martha*, or *Elizabeth D'Aranda* the mother, or her executors or administrators, in trust for the said *Martha*, and for her sole and separate use, 1000*l.*, to be paid to the said *Martha* after the decease of *Charles Henry Lee*, in case she shall survive him."

Husband covenants to give his wife by deed or will 1000*l.* at his death if she survive him, but dies intestate. She is not entitled to her distributive share in addition to her claim under the covenant.

" And in case *Charles Henry Lee* shall not,
B " by

[2]

LEE
versus
D'ARANDA
[and COX]
Hil. Va. 1746-7.

" by will or otherwise, in his lifetime, assure to
" *Martha* the said 1000*l.*, that then the execu-
" tors or administrators of *Charles Henry Lee*,
" shall, within the space of six months next after
" the decease of *Charles Henry Lee*, pay to
" *Martha D'Aranda* the sum of 1000*l.* [in case
" she survived him] to and for her own use and
" benefit." R. L.

The Court declared that the Defendant *Martha* was not entitled to the sum of 1000*l.* by virtue of the marriage articles as a debt out of the Intestate's estate, and also to her distributory share by virtue of the statute, &c. in case such distributory share should amount to 1000*l.*, or any greater sum. And after the usual decree for an account, it was ordered, " That the Master should state the amount of the surplus of the Intestate's personal estate two ways, viz. with a deduction of the sum of 1000*l.* (mentioned in the articles) as a debt, and without a deduction of any such debt." Reserving further directions. R. L.

The case cited in the report called *Oliver v. Brighthouse* is *Oliver v. Brickland*, 3 *Atk.* 420 :—*Barret v. Beckford*, cit. *ibid.* is in 1 *Ves.* 519.

Lord ELDON C. observed, that *Lee v. D'Aranda*, and *Blandy v. Widmore*, (1 *P. W.* 324.) remain unimpeached, notwithstanding *Haynes v. Mico*, 1 *Bro.* 129., and *Devese v. Pontet*, *Finch's Presc. Ch.* 240. See in *Garthshore v. Chalie*, 10 *Ves.* 13, 14.

[3]
As to the distinction between cases of Satisfaction and of Part Performance, &c.

As to the Cases of SATISFACTION, PERFORMANCE, &c. see the principal of them collected in Mr. Cox's note to *Blandy v. Widmore*, 1 *P. W.* 324., and in *Garthshore v. Chalie*, 10 *Ves.* 1. &c.

Note

Note particularly in the latter case, the elaborate judgment of Lord *Eldon* C. containing his Lordship's valuable observations on the principal case of *Lee v. D'Aranda and Cox*, as well as on the various others.

LEE
versus
D'ARANDA
[and Cox]
Hil. Va. 1746-7.

SCOTT *versus* MERRY, Hil. Vac. 1746-7.

(Reg. Lib. 1746. B. fol. 473.)

VOL. I.

Page 2.

NOTES AND OBSERVATIONS.

THE bill prayed that such of the Defendants as were entitled to the equity of redemption, might either redeem or be foreclosed; and that the release of the equity of redemption given to *Merry* might be set aside, as fraudulent against the Plaintiff.

The Defendant *Merry's* answer insisted upon having an assignment of the mortgage, on payment only of the sum of 227*l.* 10*s.* in pursuance of the agreement.

This answer is entered as read at the hearing, together with the deeds stated in the pleadings and several letters relative to the purchase under the agreements, &c. The cause was terminated by consent.

The decree referred it to the Master, to take an account of what was due to the Plaintiff on the principal sum of 240*l.* (which he had paid for the assignment (with interest at 5 *per cent.* from the time of its advancement, and to tax him his costs of the ejectment brought, and in that court.

Plaintiff having prevented the fulfilment of an agreement in favour of the Defendant *M.* for purchasing the assignment of a mortgage, by obtaining it himself at an advance, after notice, not allowed to take advantage of it being *mala fides*. Evidence therefore of a parol agreement read against him under these circumstances (1).

[4]

SCOTT
versus
MERRY,
Hil. Va. 1746-7.

And it directed that the Defendant *Merry* should pay the result within six months from the date of the report, whereupon the Plaintiff should re-convey and re-assign, &c.

It appears that *Merry* had filed a cross bill, which was by consent dismissed without costs.

Richards v. Syms, cited in the Report, is in *Barn. Ch. Rep.* 90. and *2 Eq. Ca. Ab.* 617. pl. 2.

(1) Lord *Hardwicke*, in *Richards v. Syms*, stated a point which would have assisted the Defendant here if requisite, *viz.* that a person may rebut an equity *as a Defendant*, in many cases where he cannot sue, and claim an equity as a Plaintiff. See also (as to this point) in *Wollam v. Hearn*, *7 Ves.* 211, &c. and *Cadman v. Horner*, *18 Ves.* 10—12. *Savage v. Brocksopp*, *ibid.* 335. *Garrard v. Grinling*, *2 Swanst.* 244.



VOL. I.

Page 3.

S.C. 3 Atk. 496.
quod vide.

Vicar failing in a suit for tithes in kind, and a modus set up, which was good in its nature,

[5]

though imperfectly pleaded, may yet recover in that suit the arrears due under such a modus. (1)

CARTE *versus* BALL, E. T. 1747.

(*Reg. Lib.* 1746. A. p. 704.)

NOTES AND OBSERVATIONS.

NOTWITHSTANDING what is stated in the report of the non-admission in evidence of the grant or endowment in 1209, it appears from *Reg. Lib.* that there were read at the hearing (*inter alia*) a copy of the registry of the Bishop of *Lincoln*, of the endowment of the vicarage in 1209; and an extract from a roll of institutions to benefices remaining in that registry.

Richards v. Evans, cited in the report, is at p. 39. of the volume.

(1) The

(1) The case of tythes is, however, peculiar ; for a Plaintiff in a bill for specific performance of an agreement which he cannot substantiate, is not allowed to resort to a different agreement proved or set forth by a Defendant. Vide *Legal v. Miller*, 2 *Vesey*, 299. and *Mortimer v. Orchard*, 2 *Ves.* Jun. 243. But nevertheless a Defendant may, in such a case, have a decree on the agreement, such as he has proved it to be. *Fife v. Clayton*, 13 *Ves.* 546. and *Gwynn v. Lethbridge*, 14 *Ves.* 585. In the case of *Durant v. Durant*, nevertheless (1 *Cox Ch. Ca.* 58), parties having prayed the execution of a settlement which had been prepared, and professed to carry marriage articles into execution ; and *finding at the hearing that it varied therefrom to their prejudice*, the Court gave them a *relief more beneficial than they prayed*, and decreed the articles to be carried into execution by a settlement more agreeable thereto. *Durant v. Durant*, 1 *Cox. Ch. Ca.* 58.

CARTER
versus
BALL,
E. T. 1747.

ELTON versus ELTON, E. T. 1747.

(*Reg. Lib.* 1747. A. fol. 396.)

NOTES AND OBSERVATIONS.

THE bill dismissed. *Reg. Lib.*

So *Atkins v. Hiccocks*, 1 *Atk.* 500. and *Garbut v. Hilton*, *ibid.* 381. which are cited also in the report. It must, however, be noticed, that Lord *Alvanley*, when M. R., made a distinction between the case of a *legacy*, and that of a *residue* ; and held that a share of a *residue* vested in

a

VOL. I.

Page 4.

S.C. 1 Wils. 159.
and 3 *Atk.* 504.
quod vide.

Devise of 1500l.
to a grand-
daughter to be
at her own dis-
posal, if she
married with
consent and not
otherwise. She
died at 13, not
having been
married.—

Held,

ELTON
~~partus~~
 ELTON,
 E. T. 1747.
 [*6]

Held, that the vesting depended on her marriage, and her representative, therefore, not entitled.

a party, unto whom it was directed by will to be transferred "*immediately after her marriage*," although she died *unmarried*. *Booth v. Booth*, 4 Ves. 399. His Honour seems to have decided this after great consideration; observing that every intendment was to be made, against holding a man to die intestate, *who sits down to dispose of the residue* of his property. See His Honour's distinction of the case before him from the principal one, *Atkins v. Hiccocks*, &c. in 4 Ves. 406. *Ward v. Trig*, cited p. 5. is in 3 Atk. 505.

VOL. I.

Page 6.

S.C. 3 Atk. 503.
 See *ibid.* 501.

WELFORD *versus* BEZELEY, May 23, 1747.

(Reg. Lib. 1746. B. fol. 355.)

NOTES AND OBSERVATIONS.

A mother agreeing to give her daughter 1000*l.* which by the daughter's marriage article was to be settled for her separate use, decreed to perform it. Her signature to those articles as a witness(1)(she knowing the contents) is sufficient evidence of the agreement therein recited within the Statute of Frauds, although she was not

(1) LORD *Hardwicke* states it as undeniable from the evidence, that the mother knew the contents. She had, however, in her answer, *denied knowing "whether the articles were to the effect charged in the bill; she never having had any counterpart, duplicate, or copy, thereof; and moreover, denied that the articles were executed with her approbation."* Reg. Lib.

(2) In the report of *Atkins*, Lord *Hardwicke* says, "The word '*Party*' in the statute is not to be construed '*Party to a deed*' but Person in general." See likewise the report in *Vesey*. Mr. Baron *Eyre* also says, in *Stokes v. Moore and Wife*, 1 P. W. 771. note (1). "The signature required by the statute is to have the effect of giving authenticity to the whole instrument; and

"and where the name is inserted in such a manner as to have that effect, it does not much signify in what part of the instrument it is to be found; as in the formal introduction to a will."

The original decree had directed the Master to enquire, on what account the entry of the 1000*l.* was made in the partnership books, and what was the consideration thereof; and what each of the parties really and truly advanced on account of the partnership. Upon the present appeal this part of His Honour's decree was reversed; the Court declaring, "It appeared that the entry of "1000*l.* credit given the Defendant *J. W.* in "the partnership books, was upon account of the "sum of 1000*l.*, the Defendant *J. W.*'s wife's portion, then remaining in the hands of her mother."

The Court declared, that the Defendant *J. W.* "ought to indemnify the said *H. B.* in respect of "what she should pay for the 1000*l.* and interest, "so far as it should appear he had received satisfaction for the same in the partnership account: his Lordship reserving any directions touching that indemnity until after the Master should have made his report. But in case the said *H. B.* should pay the said 1000*l.* and interest, pursuant to His Honour's decree, then, "it was ordered, that the Defendant *J. W.* should pay so much money as the sum of 1000*l.* and interest should amount to into the Bank, &c. "without prejudice on either side." *Reg. Lib.*

WELFORD
versus
BEZBLBY,
May 23, 1747.
[7]
not in terms a
party to them.
(2)
Mutual credit
under copart-
nership agree-
ment.

VOL. I. *WHELPDALE versus COOKSON, E.T. 1747.*(1)
 Page 9. (*Reg. Lib. 1748. B. fol. 552.*)

NOTES AND OBSERVATIONS.

Trustee not to
 derive advan-
 tage from a pur-
 chase of Trust
 Property.

(1) It appears that the cause was heard at this time, and a decree made, although it is not entered in *Reg. Lib.*, and that the reason of this was, that the Plaintiff, who lived in Cumberland, had died before the hearing, although it was not known at the time. The suit therefore having abated, the decree became void. The cause, however, having been revived, was heard on the 31st of *January 1749*. See *Reg. Lib. 1748. B. 552*. It appears from thence that there was no charge in the bill as to the point mentioned in the report, although the decree cites it as a question arising in the cause. The bill was filed by a Creditor against the Defendants as Executors and Trustees; and after praying an admission of assets, or an account, &c. prayed the specific performance of an agreement relative to the premises in question. It stated for this purpose, that the Plaintiff having obtained judgment by default against the Defendant *Cookson* in an action, and intending to execute a writ of enquiry thereon, was dissuaded by him from doing so; and prevailed upon by him to prosecute an ejectment at her own expence, upon the demise of *Cookson* and others, to recover the property in question, the benefit of which it was agreed, by writing, she should have towards her debt. It then stated that judgment being signed therein, &c. that the Sheriff delivered possession to the Defendant,

fendant, in trust for the Plaintiff, but that he refused to pay the debt, or turn over the property to her.

WHELPDALE
versus
COOKSON,
E. T. 1747.

The Defendant *Cookson* admitted signing the agreement under circumstances palliating his own conduct. The Defendants in general insisted, that it being necessary to dispose of their Testator's real estate, they ordered the premises in question, and some others, to be sold by auction together; but that no one chusing to bid for the same together, they were put up separately, and 103*l.* being the highest price bid for the premises in question, whereon one Mr. *W. B.* bid 104*l.* on account of the Defendant *Cookson*, and no more being bid for the same, he was reported the best purchaser; and that the premises were conveyed by the Defendants to *W. B.* and his heirs, in consideration of that sum, and were afterwards conveyed by him to the Defendant *Cookson*, who, "insisted that the said purchase was an honest one, and for a valuable consideration; and "hoped to have the benefit thereof." He stated also that he had laid out a considerable sum in improving the premises.

The decree after directing the usual accounts, &c. and also that the late Plaintiff's estate should be in the first place paid such costs as she had been put to in the ejectment, proceeded thus: "And a question arising in the cause, "whether a purchase insisted upon by the Defendant *Cookson* to have been made of part of "the said premises in question, called the *Green Dragon*, ought to stand or not, the said Defendant *Cookson* being a Trustee; his Lordship "declared, that the same ought to be put up to "sale

[10]

WHELPDALE
versus
COOKSON,
E. T. 1747.

“ sale before the said Master, in case the majority
“ of the said Creditors make their election before
“ the Master whether the same shall be put up
“ to a new sale or not ; and, if the majority of
“ the said Testator’s Creditors shall elect that the
“ same shall be put up to a new sale, then it is
“ ordered and decreed, that the said premises,
“ called, &c. shall be sold with the approbation,
“ &c. And the said Master is also to take an
“ account of the rents and profits of the said
“ premises accrued since the said Testator’s death,
“ which have been received by the Defendant
“ Cookson, or, &c. but in such case the said rents
“ and profits, and money arising by the said sale,
“ are to be applied in the first place to reimburse
“ the said Defendant what he has paid towards
“ his purchase money, with interest for the same
“ at the rate of 4 per cent. per annum, from the
“ respective times of payment thereof, and also
“ what he has laid out for lasting improvements,
“ with interest for the same at 4 per cent. &c.” for
which purpose the Master was to take an account. But in case the majority of the Creditors should elect that the purchase made by the said Defendant should stand, then he was to account before the Master for the purchase money at the rate he bought the said estate, and was to retain the rents and profits from the time of such purchase, &c. *Reg. Lib.*

Although there is no positive rule that a Trustee to sell shall not in any case be himself the purchaser, inasmuch as he is not precluded from entering into a new contract with his *cestuy que* Trust, yet he is not permitted in any other case to make a profit to himself. *Whichcote v. Lawrence,*

rence, 8 Ves. Jun. 740. Upon which see Lord Eldon C.'s observations, 6 Ves. 628.

The purchase in *Coles v. Trecothick*, 9 Ves. 234. was supported upon the ground of a distinct and clear contract with the *cestuy que* trust, he having the fullest information, and having the sole management; the Trustee being passive as to the latter circumstance. *Fox v. Macreth*, 2 Bro. 400, and affirmed on appeal in *Dom. Proc.* in 1791, is considered as a leading case in support of the Rule that a Trustee for sale shall not take advantage of his situation so as to purchase for his own benefit.

To set aside such a purchase it is not incumbent upon the party to show that the trustee has made an advantage, 8 Ves. 348; but it is in the choice of the *cestuy que* trusts to judge for themselves whether they will take back the property or not, 6 Ves. 627; so that in such a case the trustee can never be allowed to retain an advantage, but may suffer a loss, *Lister v. Lister*, 6 Ves. 631. and the principal Case *ubi supra*.

This doctrine is not confined to Trustees, but extends to Assignees under Commissions of Bankrupt, Solicitors, Agents, and in short all persons having a confidential character, *ex parte Lacey*, 6 Ves. 625; *ex parte Hughes*; *ex parte Lyon*, *ibid.* 617; *ex parte Atwood and Owen v. Foulkes*, cited *Ibid.* 630, note (b); *ex parte James*, 8 Ves. 337. See *M'Enzie v. York Buildings Company*, *Dem. Proc.* cited 6 Ves. 630 in the note. Also *Gibson v. Jeyes*, 6 Ves. 266. *Wood v. Downes*, 18 Ves. 120. and *Montesquieu v. Sandys*, 18 Ves. 302, &c. 313, &c. Note, the principle being as above, it seems that the sale being by Auction makes no difference

WHEELPALE
OCT 28
COOKSON,
E. T. 1747.

WHELPDALE
versus
COOKSON,
E. T. 1747.

difference. See 8 *Ves.* 348, with some observations of Lord Eldon C. on this particular case of *Whelpdale v. Cookson*. *Et vide* in *Nelthorpe v. Pennyman*, 14 *Ves.* 517.

The substance of the decree in this case is shortly stated in a note to 5 *Ves.* Jun. 682; but the Author of this Work has given the above extract rather more at length on account of *Whelpdale v. Cookson* having been doubted by very high authority, with reference to the note in 5 *Ves.* above referred to. See *per* Lord Eldon C. 6 *Ves.* 628, and 8 *Ves.* 349.

VOL. I.

Page 9.

S.C. 3 Atk. 509.

FLANDERS *versus* CLARK, E. T. 1747.

(Reg. Lib. 1746. A. fol. 656.)

NOTES AND OBSERVATIONS.

Legacy to J. F. the principal to be paid as her executors should judge necessary for him; but that he should not give it to his wife; and if he died without issue, that it should revert to Testatrix's family: giving interest, however, in the "mean time for

THE legacy was given by M. F. "to her son J. F. to be paid to him by her executors therein named, at such time and in such proportions as they should judge necessary for him, &c. &c. But in the mean time, she directed her executors by half yearly payments to pay him interest at the rate of 5 per cent. for such parts of the said principal, as should from time to time continue in their hands, till the whole was paid." *Reg. Lib.*

The surviving executrix directed (by her will) the legacy to be paid within two years from her own death.

See also the report of the judgment in 3 *Atkins*, 509.

[13]

Lord

Lord *Hardwicke* there adds, " Her intention seems to be that her executors should have a power of paying the whole, or a part, as the trade, dealings, or occasions of the son should require; and that he might dispose of this as he thought proper: but that while any part of it remained in the executor's hands it should be subject to the will."

As to such remote limitations of personalty as would, if applied to real estate, create an intail, and the consequent vesting of such bequests in the first taker, see Mr. *Sanders's* note to *Hodgson v. Bussey*, 2 *Atk.* 89, and *Fearne's Exec. Dev.* 144. 161. 167, *et seq.* *Et vide Butterfield v. Butterfield*, 1 *Ves.* 133, *et post*, 81.

FLANDERS
versus
CLARK,
E. T. 1747.

" what should
" continue in
" the executors
" hands till all
" was paid."

A surviving executor directs payment of the legacy within two years. The discretionary power survived having been given to the parties *quod* executors, and the whole property vested by the direction.

RIDOUT *versus* PAINE, May 1747.

(*Reg. Lib.* 1746. B. fol. 508.)

NOTES AND OBSERVATIONS.

SEE the report in *Atkins* for a full statement of the case, arguments, and decree.

The statement there agrees with *Reg. Lib. except* in the words immediately following the devise for life to the Testator's Sister. In *Reg. Lib.* they are as follows: " And after the death of the said *Elizabeth*, and the said *Mary*, the said Testator gave the said Farm and Lands at Ovingdean."

This seems material, as the words thus omitted include the moiety, which had been settled on the Plaintiff *Elizabeth* by way of jointure, as well as the two Moieties of the unsettled part. The decree,

VOL. I.

Page 10.

S.C. 3 *Atk.* 486.

Devise of all the remainder of Testator's Goods and Real Estates, will pass all his interest and the inheritance in the lands, including reversions; although the devisee had a devise of an estate for life in part of the latter. (1)

[14]

RIDOUT
versus
PAINE,
May 1747.

ere, which is accurately stated in *Atkins*, proceeds on this ground. *Chester v. Chester*, cited by Lord *Hardwicke*, is in 3. *P. W.* 56—63. Add to which what appears 1 *Ves.* 228—2 *Ves.* 48, &c.—*Cowp.* 808. 299. *Prec. Ch.* 202, and 7 *Ves.* 541, &c.

Award may be
relieved against,
where a clear
mistake in fact
or law.

See 2 *Ves.* page 11. *Sed vide Steff v. Andrews*,
2 *Madd. Rep.* 6.

VOL. I.
Page 12.
S.C. 3 Atk. 512.

CITY OF LONDON versus NASH, May, 1747.

(*Reg. Lib.* 1746. *B. fol.* 475. entered *Mayor*
of, &c.)

NOTES AND OBSERVATIONS.

Lessee, cove-
nanting to re-
build several
houses, does not
perform it, by
rebuilding some
and repairing
others; although
at a considerable
expence. Issue
directed of
*quantum damni-
ficatus*. (1)

See this case reported rather more fully in
Atkins.

(1) “ The Court declared, it appeared that
“ *Greaves* the Lessee was only an agent and
“ trustee for the Defendant *Nash*, in contracting
“ for and accepting the said lease, and that the
“ true intent and meaning of the contract of the
“ 8th of *December* 1736, and also of the said
“ lease was, that the Lessee should rebuild all the
“ messuages then being upon the ground demised
“ by the lease; and ordered the parties to pro-
“ ceed to a trial at law upon an issue to try how
“ much the Plaintiffs were damnified by *Greaves*
“ or *Nash* not having rebuilt all the messuages in
“ a workmanlike manner, but only having re-
“ paired the same in such manner as they had
“ been repaired by *Greaves* and *Nash*, or either
“ of them. The Plaintiffs in Equity to be the
“ Plaintiffs at Law, and *Nash* to be the Defend-
“ ant.” *R. L.*

[15]

Lord

Lord Thurlow C. disapproved of the Court's interference as to covenants to rebuild, notwithstanding this case, and *Allen v. Harding*, 2 Eq. Ab. 17.

CITY OF
LONDON
versus
NASH,
May 1747.

See in *Lucas v. Comerford*, 3 Bro. 166, and 1 Ves. Jun. 235.

But it seems, upon the whole, that Specific Performance of such a Covenant would still be decreed where the Courts of Law cannot give an adequate satisfaction in damages; and where the agreement is sufficiently certain, distinct, and defined in its nature. See *Moseley v. Virgin*, 3 Ves. 184.

Et vide arguendo, et per M. R. in Flint v. Brandon, 8 Ves. 161, 162, &c.

HAWES versus HAWES, Trin. T. June 26,
1747.

(*Reg. Lib.* 1746. A. fol. 707.)

VOL. I.

Page 13.

S.C. 3 Atk. 524.
and 1 Wils. 165.

NOTES AND OBSERVATIONS.

THE recital, and what relates to the customary and testamentary parts (which are relied on in the judgment) are not stated in *Reg. Lib.*

The words of the devise by the Son, as in *Reg. Lib.* are "equally to his three children, and their heirs, as tenants in common, and to the survivor of them, and the heirs of such survivors, when they should attain their age of 21 years, or marriage," &c. *R. L.*

As to what Lord Hardwicke observes (p. 14.) with regard to the words in a devise, "to all
"equally"

Devise of lands to four younger children equally share and share alike as tenants in common and not as joint tenants, with be-
[16]
nefit of survivorship. This referring to a former survivorship, is a tenancy in common

HAWES
versus
HAWES,
Trin. T. 1747.

mon, with a limitation to the survivors, after the death of any of them before 21, without issue. See *Mendez v. Mendez*, 1 Ves. 89, and *Stones v. Heurtly*, 165, post, &c.

“equally” importing a tenancy in common, see *Blissett v. Cranwell*, 1 Salk. 226, and the cases cited in the margin. (S. C. 3. Lev. 373.) upon which see per Lord Hardwicke, 1 Ves. 167. *Et vide Stones v. Heurtly*, 1 Ves. 165. *Prince v. Heylin*, 1 Atk. 493. *Owen v. Owen*, *ibid.*, 494. *Rigden v. Vallier*, 3 Atk. 733. *Campbell v. Campbell*, 4 Bro. 15, &c. As to the period unto which survivorship is generally to be referred, see 1 Ves. 90. and 167. *Russell v. Long*, 4 Ves. 551. 554. Per M. R. 7 Ves. 286. The case of *Bindon v. Lord Suffolk*, though decided ultimately in *Dom. Proc.* has been doubted. See per M. R. 4 Ves. 554. See also 2 Ves. Junr. 638. and *Roebuck v. Deans*, 2 Ves. Junr. 265. and 4 Bro. 403. S. C. *Stringer v. Phillips*, 1 Eq. Ca. Ab. 292. *Rose v. Hill*, 3 Burr. 1881. 1885. *Perry v. Woods*, 3 Ves. 204. *Maerberly v. Strode*, *ibid.* 450. See also *Cambridge v. Rous*, 8 Ves. 12, &c.

[17]

The Profession will find the distinction between those cases where the period of survivorship has been confined to the death of the Testator, and those which are referred to Lord Hardwicke's doctrine in the principal case, accurately stated in that very useful and comprehensive work, Mr. *Roper's Treatise on Legacies*, 2 vol. 268 *et seq.* 279 *et seq.* in which the several cases are not only collected and referred to, but shortly stated, with the judgment on each fully.

It ought to be observed, that although Lord Hardwicke refers to the disposition of the testamentary part by the Will as a key to the rest (page 14), that part of the will does not appear in *Reg. Lib.*

The Court declared “That the share of C. H.
“ one

" one of the younger children of the said *A. H.*
 " the elder, in the real estate devised by his will
 " to his younger children, did, upon his the said
 " *C. H.*'s death under the age of 21 years without
 " issue, descend to the surviving younger chil-
 " dren." *R. L.*

HAWES
versus
HAWES,
 Trin. T. 1747.

VOL. I.

Page 15.

S.C. 3 Atk. 526.

Executor of husband who survived his wife but did not take out administration, is entitled to her share under the Custom of London, and her administrator is but a trustee for him. Personal presents, &c. no advancement so as to bar the customary share : neither was maintenance, though after marriage ; the same being charged against her as a debt under the will.

[18]

VOL. I.

Page 17.

S.C. 3 Atk. 295, and 547.

Baron and Feme. Separate maintenance, &c.

ELLIOT *versus* COLLIER, July 1, 1747.

(*Reg. Lib.* 1746. *A. fol.* 536.)

NOTES AND OBSERVATIONS.

IN case the Daughter should not execute the Release, the Testator directed that " The devise of a freehold estate he had given her in Bishops-gate-street was to cease," over and besides the annual sum which was to be deducted for her maintenance, as mentioned in the report. *R. L.*

The Statutes referred to in the argument are 31 *Edw.* III. c. 11. and 21 *Hen.* VIII. c. 5.

The case of *Hearne v. Baker*, adverted to by Lord *Hardwicke*, is in 3 *Atk.* 213.

See the Decree in the principal case stated in 3 *Atkins* 529 ; which agrees with *Reg. Lib.*

LADY HEAD *versus* SIR F. HEAD,
 July 3, 1747.

(*Reg. Lib.* 1746. *A. fol.* 626.)

NOTES AND OBSERVATIONS.

THIS case is reported more accurately and fully in 3 *Atkins*.

LADY HEAD
versus
 SIR F. HEAD,
 July 3, 1747

The letter alluded to in 1 *Ves.* 17, is stated *verbatim*, 3 *Atk.* 547.

The Defendant admitted the letter in his answer, but insisted that he did not intend it as an agreement for a separation, or as an agreement for a separate maintenance, or otherwise than what he thought a proper allowance for the maintenance of the Plaintiff and her daughter, whilst she continued under the care of her father (who was a physician), and not otherwise, or for any longer time. The Defendant, besides denying all the rest of the case made by the bill, stated, that he had for a long time, and from time to time since the Plaintiff left her father's, desired and pressed her to come home and live with him; but that she had refused, and had for a long time lived and kept company with low and mean people, &c. which had given him great uneasiness. That he was ready and willing to maintain her at home in a manner suitable to her degree as his wife, and that it was, and would be, proper for her to be at home in her own house, with her own servants about her, and where she could have proper assistance and care taken of her, and not to move from lodging to lodging, in a low mean way, as she had for some time past done, &c. &c. The answer also stated circumstances tending to shew her derangement, and impropriety of conduct, and that the Plaintiff had for a considerable time, and did then, lodge and live at the house of a person who was a common player; and that she had continued to live so, contrary to the advice and request of her mother, &c. &c. Insisting that he was not obliged to maintain her abroad, and in a manner of life inconsistent with her own honour,

honour, or that of the Defendant and his family.
Reg. Lib.

LADY HEAD
versus
SIR F. HEAD,
July 3, 1747.

As to the case of *Whorwood v. Whorwood*. 1 Ch. Ca. 250, which appears relied upon in 1 Ves. 19; Lord Hardwicke is reported to say in 3 Atk. 296, that “it was determined during the Usurpation, and whilst the Jurisdiction of the Ecclesiastical Court was suspended.”

The decree states that “the Defendant having offered by his answer to receive and maintain the Plaintiff as his wife, in case she would return home, he is ordered so to do. But if she did not return home within a month, the payment of the arrears was to be stopped; and on the other hand, if she returned home, and the Defendant refused to receive, maintain, and treat her as his wife, the separate maintenance should then continue.” R. L. and 3 Atk. 551.

The Author of this Work abstains from inserting the different collections of Cases, which he had classed for his intended edition of *Vesey* on the various subjects of Marital Law, from a fear of over-loading the present Work: and he trusts the Profession will anticipate the like motive in similar cases.

CORY versus CORY, July 3, 1747.

(The Author could not find any entry in *Reg. Lib.*)

[20]
VOL. I.
Page 19.

NOTES AND OBSERVATIONS.

(1) See *post* 194, and 2 Ves. 444 and 450 *et per* Lord Eldon C. 1 Ves. and Beames 30. *Vide etiam* *Naylor v. Winch*, 1 Sim. and Stu. 555.

Agreement reasonable in itself and to settle family disputes

c 2

(2)

(1)

CORY
versus
CORY,
July 3, 1747.

(1) not set aside
because the
party was in-
toxicated; (2)
no advantage
having been
taken of it.

(2) As between strangers a Court of Equity will not assist a person who has obtained an agreement from one who was intoxicated, or the other person to get rid of it. Fraud or contrivance form exceptions of course. *Cooke v. Clayworth*, 18 Ves. 12.

Page 19.

BUSH versus DALWAY, July 7, 1747.

S.C. 3 Atk. 530.

(Reg. Lib. 1746. A. fol. 671.)

NOTES AND OBSERVATIONS.

Baron and
Feme.

Chose in action.
Wife who sur-
vived her hus-
band bound, un-
der the circum-
stances, by his
covenant as to
a chose in ac-
tion, which be-
came a vested
interest after
the execution
of the instru-
ment, so that
he might have
disposed of it
in her lifetime.

[* 21]
Construction
"or" substitut-
ed for "and"
upon the plain
meaning, from
the extensive-
ness of the con-
text, to carry
the subject fur-
ther.

THIS case is more accurately stated in *Vesey* than it is in *Atkins*. Though the report there affects to set forth the deed, it is done inaccurately.—It is *not stated in Atkins* that the Defendant, *the Wife*, was a party to the deed, which is there stated merely as a covenant of the Husband; whereas it was a regular deed of settlement, whereby the wife herself, in the first place, assigned the sum of 500*l.* due to her by bond. It is true that the covenant, which came immediately in question in this case was that only of the intended husband; but it was in the same deed, to which she was a party, as above mentioned. *R. L.*

See the rep. at the top of p. 20.—The sentence there as corrected from *R. L.* would run properly thus—"and received this 2000*l.* which she claimed absolutely as a chose in action, not called in by the husband, and so surviving to her. The bill was brought by [the Executor of the surviving Trustee, and] her children, who were infants, to have this 2000*l.* placed out for their benefit, subject

“ subject to her estate for life therein: [*insisting, that it became due and payable, and ought to have been paid to the Plaintiff, as such executor of the surviving trustee, upon the death of the Defendant's father.*]

BUSH
versus
DALWAY,
July 7, 1747.

N. B. The alterations and additions here are in Italics, and the latter also between brackets.

Theobald v. Dfay, mentioned in page 20, is in 9 *Mod.* 101, and cited in the reference there made to 2 *P. W.* 608. See *D. Chandos v. Talbot*, 2 *P. W.* 601. 608. *Bates v. Dandy*, 2 *Atk.* 207. 208. and *Hawkins v. Obyn*, *ibid.* 549.

See top of page 21.—The Court therefore declared, “ that, on the construction of the deed, and the event which had happened, the Plaintiffs, the children, or such of them as should survive the Defendant, would be entitled, &c.” and therefore referred it to the Master to inquire, whether the sum was properly secured; and, if the Master should find that it was placed out on a proper security, then the same was to be continued on such security, subject to further order; but if not, then the same was to be called in and placed out again with the approbation of the Master, &c. *Reg. Lib.*

GODOLPHIN *versus* GODOLPHIN,
July 20, 1747.

(*Reg. Lib.* 1746. *A. fol.* 716. entered “ Godolphin *v. Geary.*”)

[22]
VOL. I.
Page 21.

NOTES AND OBSERVATIONS.

In the extract from the bill at p. 21, after the word Devise to A. in fec,

GODOLPHIN
versus
GODOLPHIN,
July 20, 1747.

fee, with direc-
tions to settle
on descendants
of his mother
for their several
lives, &c. A.
may limit an
inheritance to
effectuate the
general intent.

word "*appoint*," and instead of the words "*and*
"*she*" read as follows, "but not to take place
" during such time as she my said executrix shall
" live and be unmarried, or be a widow; for my
" mind is she shall have and enjoy all the income
" of my estate to her own use during such time of
" her life as aforesaid, and also that all persons so
" descended as aforesaid, being females, shall be
" by the writing or assurance to be made debarred
" of all right, profit or advantage, whatsoever,
" during the time they shall be under covert, or
" be in a married state, which they might have
" otherwise by virtue hereof enjoyed. And I
" declare that my executrix may, &c." *Reg. Lib.*

Towards the end of the extract, instead of the
words "*executing the power*," read "making such
" writing, settlement, and appointment." *Reg. Lib.*

The case of *King v. Melling*, cited page 22, is
in 2 *Lev.* 58, and 1 *Ventr.* 225.

As to what is said, page 23, with respect to its
being a case of a power without an interest, see
M. of Antrim v. D. of Bucks, 1 *Ch. Ca.* 17.

[23]

As to the next position, of such an execution
being good, although there were an interest, see
1 *Ves.* 163. 303. 517.

As to the remark which concludes that para-
graph, see *Ball v. Fardy*, 1 *Ves.* Jun. 270.

The court declared, "that the settlement or
" deed of appointment appeared to the Court to
" be pursuant to the said will, except in the par-
" ticulars following; that is to say, that the sever-
" al contingent remainders of the inheritance of
" the said estate ought to have been postponed to
" the respective estates for life, limited by the
" said deed to the persons therein named, who
" were

“ were then in being ; and that there ought to
 “ have been a remainder limited, immediately
 “ preceding the remainder or reversion in fee to
 “ the heirs of the body of Dame *Maria Dixie*, the
 “ testator’s mother ; and, that the remainder or
 “ reversion in fee, ought to have been limited to
 “ the right heirs of the said *John Dixie*. And it
 “ was ordered, that the said settlement be rec-
 “ tified in the several particulars before-mentioned
 “ with the approbation of the Master : and that
 “ the several contingent remainders of the inhe-
 “ rittance created by the said deed be postponed
 “ to all the limitations thereby made to the per-
 “ sons then in being, for their lives ; and imme-
 “ diately after the contingent remainders, that a
 “ remainder should be inserted to the heirs of the
 “ body of the said Dame *Maria Dixie*, with a
 “ remainder, or reversion in fee, to the right heirs
 “ of the testator *John Dixie* ; and that a new
 “ settlement or conveyance should be made of the
 “ said estate accordingly.” *Reg. Lib.*

GODOLPHIN
 versus
 GODOLPHIN,
 July 20, 1747.

ALLANSON *versus* CLITHEROW,
 July 23, 1747.

(*Reg. Lib.* 1746, *A. fol.* 711.)

[24]
 VOL. I.
 Page 24.

NOTES AND OBSERVATIONS.

(1) THE Testator made *two* codicils to his Will, confirming his will by each expressly, except in the points specified in each. The substance of the one set forth in the report agrees with *Reg. Lib.*

The words used in the will with reference to the fortune

Devise to A. for life, with power for trustees to settle a jointure on his wife ; and subject thereto in strict settle-
 ment

ALLANSON
versus
CLITHEROW,
July 23, 1747.

ment on the
issue of such
marriage; but,
if A. should die
without any issue
of his body,
then over—The
latter words
give him an es-
tate tail by
implication. (1)

As to estates
pur auter vie. (2)

[25]

fortune contemplated to be brought by the Devi-
see's wife was not "*good*," as mentioned in the
report, but "*suitable*;" which is rather material,
since the Decree proceeds *expressly* on the word
"*suitable*."—Upon this point, the Court declared
"that by the words '*a suitable fortune*,' was meant
"and intended a portion or fortune *bearing a*
"*reasonable proportion* to a jointure of 400*l.* a
"year rent charge." *Reg. Lib.* 713.

(2) The bill (*inter alia*) insisted, that an estate,
pur auter vie, belonging to the testator, vested in
his executors by virtue of the statute, [29 *Car.* II.
c. 3. § 12, and see 14 *Geo.* II. c. 20. § 9.] and
ought to be deemed part of his personal estate.
The defendant *Cowper* insisted that it ought to be
included in the settlement as part of his real
estate. The decree takes no notice of this point.
But see *Ripley v. Waterworth*, 7 *Ves.* Jun. 425.
et vid. Lord *Eldon C.* 18 *Ves.* 273. The bill as to
other points alleged, that the testator had pur-
chased some real estates after the execution of his
will. The answer of the Defendant *Cowper* sub-
mitted how far such lands as were purchased after
making his will, and before making the codicils,
might be affected by them, or either of them.
These points seem much relied on in the plead-
ings. The Decree referred it to the Master to
inquire "whether any lands or real estate were
"purchased by the testator after making *his last*
"*codicil*." And if the Master should find that
there were, it was declared they were not to be
included in the settlement, but descended to the
Plaintiff as heir at law. *R. L.*

In these questions of estates by implication, the
Courts both of Law and Equity proceed upon the
principle

principle of effectuating a *Testator's general manifest intention*. See most of the cases up to that time collected in *Robinson v. Robinson*, 1 Burr. 38. see *ibid.* 50. 51, &c. See *Evans v. Astley*, 3 Burr. 1570, *Doe v. Applin*, 4 T. R. 82. *Dunn v. Slater*, 5 T. R. 335. *Doe v. Halley*, 8 T. Rep. 5. *Attorney General v. Sutton*, 1 P. W. 754. *Lethieullier v. Tracy*, 3 Atk. 784.

ALLANSON
versus
CLITHEROW,
July 23, 1747.

BEAUMONT versus THORPE, July 25, 1747.

(Reg. Lib. 1746. A. fol. 598.)

VOL. I.

Page 27.

NOTES AND OBSERVATIONS.

See 2 *Vesey* 10 and 11, as to the difference between the 13 *Eliz. c. 5. which is in favour of Creditors*, and the 27 *Eliz. c. 4. which is in favour of Purchasers*: from whence it appears that in respect of the latter, every voluntary conveyance is void against a subsequent one for valuable consideration, though no fraud, and the party not indebted at the time; whereas a creditor, to take advantage of the 13 *Elizabeth*, must prove that the party was indebted. See also in *Ward v. Shallet*, 2 *Ves.* 18. See in *Russell v. Windham*, 1 *Atk.* 15, and the note there (Mr. Sanders' Ed.). *Walker v. Burrows*, *ibid.* 93. *Lush v. Wilkinson*, 5 *Ves.* 384. *Kidney v. Coussmaker*, 12 *Ves.* 136. *Montague v. Lord Sandwich*, there cited 148. 155, and note (a) 156.

Settlement after marriage voluntary, and void against creditors.

[26]

P. 28. It was declared void against the Plaintiff "and all judgment and specialty creditors." Reg. Lib.

The Infant had his day to show cause against the Decree after attaining 21, &c. "The

BRAUMONT
versus
THORPE,
July 27, 1747.

" The Defendant was to be at liberty to make
" her election, whether she would insist upon her
" dower out of the whole estate, in case any part
" thereof should be sold under the Decree, or
" whether she would take the benefit of the settle-
" ment in the rest of the estate that should remain
" unsold." *Reg. Lib.*

It appears from *Ward v. Shallet*, 2 *Vesey* 16, *et post* 254, that a settlement by the husband on his wife and children, upon her agreeing, with her friend's privity, to part with her contingent interest, is good against his creditors: and, likewise, if it is made in consideration of money advanced by a father, or collateral relation, by way of new portion; there being no fraud, or collusion, or such inadequacy as to imply it. See also 2 *Ves.* 308, &c. *et post* 350, 351.

[27]
VOL. I.

Page 28.

BAKER versus HART, July 31, 1747.

(*Reg. Lib.* 1746. A. fol. 706.)

NOTES AND OBSERVATIONS.

S.C. 3 Atk. 542.

Legitimacy—
Issue—New
Trial.

As to the nature of commissions of review from sentences of the Delegates, &c. see *Matthews v. Warner*, 4 *Ves.* 186. 5 *Ves.* 23, and *ex parte Fearon*, *ibid.* 633.

There were two issues at Law. It appears from *Reg. Lib.* that the Jury not only found the first issue in the affirmative (for the Defendant), but that they negatived the title of the Plaintiff's father in the second; contrary to what Mr. *Vesey* reports Lord Hardwicke to have said in p. 30. Vide *Reg.*

Reg. Lib. 707. The true state of circumstances is properly stated 3 *Atk.* 542, and Lord *Hardwicke's* observation is explained *ibid.* 543.

BAKER
versus
HART,
July 31, 1747.

As to the case of *Vernon v. Acherly*, cited p. 29. see the will, &c. with the proceedings in that cause in 3 *Bro. P. C.* 85, octavo edition.

Attorney General v. Montgomery, cited *ibid.* 2 *Atk.* 378.

As to the granting of new Trials after Trials at Bar, &c. &c. &c. see in *The Queen v. The Bailiffs of Beudley*, 1 *P. W.* 207. 212, *et seq.* and *Richards v. Symes*, 2 *Atk.* 320.

Stapylton v. Stapylton, *ib. cit.* 1 *Atk.* 2.

Lord *Hardwicke's* observation as to the finding of the Jury in the principal case on the *second issue*, was not (and could not be) as stated in *Vesey's report*, p. 30. (*causd quâ supra*) ; but it is correctly stated in 3 *Atk.* 543. His Lordship there observes, that the Jury *did negative the title of the Plaintiff's father on the second issue* ; but that they were induced so to find by their verdict on the first.—This exactly shows the nature of Mr. *Vesey's* mistake ; whose report was, doubtless, framed from the notes he had taken in Court.

[28]

Marwell v. Montague, cited p. 30. in 11 *Vin.* Ab. 65. Tit. Executors, pl. 9. See *Baker v. Pritchard*, 2 *Atk.* 388.

VOL. I.

Page 30.

EARL of PORTSMOUTH *versus*
LADY SUFFOLK and LORD EFFINGHAM,
August 1, 1747.

(Reg. Lib. 1746. A. fol. 634.)

NOTES AND OBSERVATIONS.

Parties entitled to an estate, confirming a Jointress's settlement, are purchasers of her interest in incumbrances paid off by her fortune, which had been assigned for the better securing her rights under the settlement.

[29]

See page 31. . Lady *Suffolk*, therefore, insisted that the assignment of the incumbrances ought to be for her benefit, in case she should not otherwise be completely satisfied in respect of all her claims under her marriage settlement; but said, when the same were secured to her, she was willing to assign the incumbrances for the Plaintiff's benefit: she being a purchaser thereof for a valuable consideration without notice of the Plaintiff's title.

The Decree (see page 32) on the present occasion of the cause coming on upon the equity reserved, directed (*inter alia*) that the Plaintiff should execute proper assurances for confirming the Defendant's jointure, and the term of 100 years, and that certain of the incumbrances should be assigned to trustees, in the first place, for the like purpose, and afterwards to attend the inheritance; and that the others should be assigned in like manner; in the first place for the first mentioned purpose, and then to indemnify the Plaintiff's estate in question in the cause in respect of the Defendant's jointure and other provisions, and the Plaintiff's confirmation thereof; and an inquiry was directed for these purposes. As to the term of 100 years, the Court declared that the Plaintiffs were entitled to be indemnified
against

against the same out of the Earl of *Suffolk's* personal estate, and directed the Master to see a proper fund allotted thereout for that purpose, and placed out in trust in the first place for payment of the said 150*l. per annum* to the Defendant (who was the Earl's administratrix), and subject thereto in trust for the persons entitled to the personal estate. *R. L.*

EARL OF PORTSMOUTH
versus
LADY SUFFOLK
and
LORD EFFINGHAM,
Aug. 1, 1747.

ATTORNEY GENERAL *versus* LLOYD,
August 1, 1747.

(*Reg. Lib.* 1746. *A. fol.* 689.)

VOL. I.

Page 32.
S.C. 3 Atk. 551.

NOTES AND OBSERVATIONS.

(1) See also 1 *Ves.* 178. 225.

Mortmain Act, 9 *Geo.* II. ch. 26.

Ashburnham v. Kirkhall (cited page 33) is *Ashburnham v. Bradshaw*, 2 *Atk.* 36, and *Barn. Ch. Rep.* 6. See also *Willet v. Sandford*, 1 *Ves.* 178 and 186. *Attorney General v. Andrews*, 1 *Vesey* 225. *Attorney General v. Heartwell, Amb.* 451, and *Attorney General v. Downing, ibid.* 550.

Clifton v. Lady Lombe (cited p. 33) is in *Amb.* 519.

Question as to revocation of a will merely on the words, sent to law.

[30]
Will made before the Mortmain act good, although the testator died after it. (1)

Page 35. The Court ordered a case to be made for the Judges of the Court of King's Bench, on the Testator's Will and Codicils, and the Mortmain Act, wherein the question was to be, "whether the Testator's real estate in Stretton and Shrewsbury were well devised by the second codicil, dated the 17th of March 1736, to the Defendant *M. B.* for life, with remainder over to his first and other sons in tail male, the said
" *M. B.*

ATTORNEY
GENERAL
versus
LLOYD,
Aug. 1, 1747.

"*M. B.* having attained his age of 21 years," &c.
The Judges of the Court of K. B. viz. Lord Chief Justice Lee, Mr. Justice Wright, Mr. Justice Dennison, and Mr. Justice Foster, by their certificate, dated January 24, 1748, certified their opinion in the affirmative.—Whereupon Lord *Hardwicke* Chancellor, on the 5th of May 1749, declared accordingly, and directed the trustees to pay to *Millington Buckley* what should be coming upon the balance of an account directed of the rents and profits of the said estates accrued since the time when he attained 21.—*Reg. Lib.* 1749. *A. fol.* 597. *3 Atk.* 554.

[31]
VOL. I.
Page 35.

TOWNSEND versus LOWFIELD, July 25, 1747.
(*Reg. Lib.* 1746. *B. fol.* 461.)

S.C. 3 *Atk.* 536.

NOTES AND OBSERVATIONS.

Account—
Liberty to sur-
charge and fal-
sify.

The bill was filed by the executors of *William Horton* (not *Hall*, as is stated,) to set aside a deed of assignment, and various securities, and also a stated account, which, it alleged, were fraudulently obtained by *Lowfield* from *Horton*. It stated, that by such deed *Horton* had assigned all his right to his father and mother's personal estate (which was recited to be of a considerable amount) in the hands of his maternal grandfather Sir *William Saunderson* to the Defendant in trust, to repay him the consideration therein expressed of 100*l.* lent and advanced for *Horton's* use, and for the security of all such further sums as the Defendant should lend and advance for his use afterwards

afterwards, and after payment of *Horton's* creditors, to pay the residue to him. The bill then stated very particularly the several other circumstances abovementioned, together with various instances of gross oppression and fraud. The Defendant (*inter alia*) stated by his answer, that the proposal for the assignment originated with *Horton* alone, without the least hint from the Defendant (1), who was at first averse to it, and that he was induced to accept of the assignment to assist him, in consequence of his complaints of the hardships he was under for want of money, though he had 10,000*l.* due to him from Sir *William Saunderson*, and in consequence of his promising to give the Defendant 500*l.* when he should recover the money; and that *Horton*, and one *Quaile*, a friend of his, solicited the Defendant to accept of the assignment, and to bring a bill against Sir *William* for what was due from him. And that the Defendant having therefore agreed so to do, *Quaile*, at *Horton's* request, prepared the assignment. The Defendant then stated the various advances and transactions relative to the securities, vouchers, and acknowledgements, so as to endeavour to exculpate himself.

TOWNSEND
versus
LOWFIELD,
July 25, 1747.

[32]

The Court directed that the Master should proceed to take the accounts pursuant to the preceding Decree, with the addition, that the Plaintiffs be at liberty before the Master, to falsify the two accounts, or admissions of the Defendant's

(1) See Lord *Eldon* C.'s observation as to the first propositions in such cases generally appearing to come from the needy person; in *Evans v. Chesshire*, *postea*, note to Lord *Chesterfield v. Janssen*, pp. 297. 306.

charge,

TOWNSEND
versus
LOWFIELD,
July 25, 1747.

charge, dated the 26th of March and the 3d of February 1742. *Reg. Lib.*

Upon the cause coming on again, about a year after the above period, upon the matter of exceptions and costs, the Court did not think fit to give any costs on either side. *Reg. Lib.* 1747. *B. fol.* 445.

Though Courts of Equity will open stated accounts of ever so long standing in a case of *clearly apparent fraud*, *Vernon v. Vawdry*, 2 *Atk.* 119. yet they will not otherwise, nor open an account settled ten years, &c. before the bill filed, though containing very gross items. The party may, however, be allowed to surcharge and falsify, but the burthen of proof lies upon him. *Brownell v. Brownell*, 2 *Bro.* 62. As to these points, see *Sewell v. Bridge*, 1 *Ves.* 297, *post.* 152; *Earl Pomfret v. Lord Windsor*, 2 *Ves.* 482; *Pitt v. Cholmondely*, *ibid.* 565.

[33]

VOL. I.

Page 37.

General demurrer to a bill for discovery of a settlement, stating a title contradictory

STROUD *versus* DEACON, August 10, 1747.

(*Reg. Lib.* 1746. *B. fol.* 449.)

to that alleged to be insisted on by the Defendant, and charging, that the Plaintiff's case would appear as stated, if the settlement were produced.—The demurrer over-ruled, being unsupported either by answer or plea to cover the charge.

SHEPHERD *versus* COTTON, Aug. 10, 1747.
(Reg. Lib. 1747. B. fol. 495.)

VOL. I.
Page 38.

NOTES AND OBSERVATIONS.

THE Defendant demurred “*as to so much of the bill as prayed*, that the Plaintiff might be paid his moiety or share of the Knight’s fees or wages pretended to be due to him, or that prayed any other relief; and, for cause of demurrer, showed, that the Plaintiff had not made such a case by his bill, as would entitle him, in a Court of Equity, to any such relief as was thereby prayed.” *R. L.*

Demurrer allowed to bill for payment of wages of Knights of a Shire; the remedy being at Common Law.

RICHARDS *versus* EVANS, *et e contrà*,
Oct. 26 [and Nov. 27] 1747.
(Reg. Lib. 1747. B. fol. 151.)

[34]
VOL. I.
Page 39.

NOTES AND OBSERVATIONS.

- (1) VIDE also in *Carte v. Ball*, per Lord Hardwicke, 1 *Ves.* 3. *et ante*.
- (2) Vide 2 *Ves.* 514; but more particularly per Lord Eldon C. in *O’Connor v. Cook*, 6 *Ves.* 671. 674.
- Rankness of a modus is only evidence as to the non-immemoriaty, and does not of itself form an objection in point of law. See *O’Connor v. Cook*, 6 *Ves.* 665. 672. 8 *Ves.* 536. 539.
- As to the distinction noticed by Lord Hardwicke
- Modus.—It is not necessary to use the word “modus” in laying it, or a particular day of payment (1). A modus may be overturned for rankness, if for a specific thing and clear. If otherwise it will be sent to Law. (2)

RICHARDS
VERSUS
EVANS,
Oct. 26, 1747.

wicke, between a *modus* for tithes of particular things, and a *Farm-modus*, &c. see it enlarged upon by Lord *Eldon* C. in *O'Connor v. Cook*, 6 *Ves.* 672. See various instances cited in that case, in some of which the Court has determined the matter itself, whilst in others it has sent it to a jury.

One of the *terriers* mentioned in the report page 40, dated March 16, 1683 (signed by the then Rector and eight of the principal inhabitants) stated; "that the tithes of the parish were paid in kind, excepting the township of B. (all one gentleman's lands), for the corn and hay of which he paid 7*l.* yearly to the Rector." The other *terrier*, dated 5th of June 1730 (all in the then Rector's own hand-writing) stated, "that the then owner of the township paid for his tithe corn and hay 7*l. per annum*, and was signed by the Rector, Churchwarden, and 20 Inhabitants."

[35.]

The Rector, by his answer to the cross bill, insisted that "the true sense and meaning of these *terriers* was, that the 7*l.* was not to be construed as a *modus*, but as a yearly rent, for that in those very *terriers*, immediately after mention of the 7*l.* paid for the corn and hay in B. there were two *modusses* or *prescriptions* for two other places in the parish mentioned in express words to be *Prescriptions*."

The original bill was dismissed by consent without costs. And in the cross cause by consent of the Rector's clerk in Court, it was decreed, that the said *modus* of 7*l.* a year should be established; that the arrears then due should be paid to the Defendant, the Rector; and that the growing

ing payments thereof should be continued to be paid yearly to the said Rector and his successors from time to time upon Candlemas-day, and no costs were to be paid on either side in the cross cause. *Reg. Lib.*

RICHARDS
versus
EVANS,
Oct. 26, 1747.

It appears from *Reg. Lib. ubi supra fol. 65*, that the cause had stood over from the 26th of October to November the 27th "for the parties to consider of a proposal." The Decree referred to by this note was the result of it, and bears date on the day last mentioned.

BAINES versus DIXON, October 31, 1747.

(*Reg. Lib. 1747. A. fol. 112.*)

[36]
VOL. I.

Page 41.

NOTES AND OBSERVATIONS.

THE present appeal was brought after a rehearing at the Rolls, in which the Order was affirmed. *Reg. Lib. fol. 112. 113.*

A sale directed on the words "rents and profits" alone, though generally contrary to testator's intent, in aid of a creditor, on the ground of law, that in a will those words meant and passed the land itself.

Towards the end of the first paragraph, instead of the words "as shall be then living, &c." the statement in *Reg. Lib.* is thus "in equal portions when his son the Defendant M. should attain the age of 23 years, and not sooner, or as soon after as his said younger children should respectively attain the age of 21 years." No more of the will is stated in *Reg. Lib.*

Another construction, however, as to legacies upon the addition of the words "as the profits," &c. should advance the money.

After varying his Honour's Order, by confining the sale to the *debts*, the following addition to it was directed, viz. "That the rents and profits of so much of the testator's real estate as should remain unsold, and the rents and profits of the

BAINES
versus
DIXON,
Oct. 31, 1747.

" whole real estate till such sale, after payment
" of the interest of the debts, and the allowance
" for the infant's maintenance, be applied towards
" payment of the interest of the legacies from a
" year after the testator's death, and then to sink
" the principal *pari passu*."

[- 37]

Though a sale of land has in many cases been directed on a devise of "*rents and profits*," &c. see 1 *Ves.* 42. 171, and *Amb.* 95; it nevertheless seems, that in general, and ordinary instances, the natural meaning of the word "*profits*" is "*annual profits*;" and, that the cases which have extended it further, are exceptions out of the general rule, from particular circumstances. See Mr. Cox's note to *Trafford v. Ashton*, 1 *P. W.* 418; *et vide Conyngham v. Conyngham*, 1 *Ves.* 522, and *Reg. Lib.* 1749. *A. fol.* 635. 637, and the notes thereon *postea* (221.) and *Belt v. Mitchelson*, *post*, 227.

VOL. I.

Page 43.

S.C. 3 Atk. 576.

Though an information relative to a charitable use will not be dismissed where a clear right is to be settled, yet the information in this case was dismissed with

costs, no charitable funds being in question, and no proof entered into as to an alleged right of election, which it sought to establish.

ATTORNEY GENERAL *versus* PARKER (1),
November 4, 1747.

(*Reg. Lib.* 1747. *A. fol.* 317.)

Called there *Attorney General v. Doughty*.

NOTES AND OBSERVATIONS.

(1) SEE *Attorney General v. Forster*, 10 *Ves.* 335.

(2) *Attorney General v. Day*, cited page 43, is also in 1 *Ves.* 218.

Attorney

Attorney General v. Scott, *ibid.* is likewise *ibid.* 413.

See the above-mentioned cases, and *Attorney General v. Smart*, 1 *Ves.* 72, &c. et vide 2 *Ves.* 328, 11 *Ves.* Jun. 247, and *Attorney General v. Mayor of Stamford*, 1 *Swanst.* 591.

ATTORNEY
GENERAL
versus
PARKER,
Nov. 4, 1747.

HODGSON *versus* RAWSON, Nov. 6, 1747.

Page 44.

NOTES AND OBSERVATIONS.

Hall v. Terry, cited p. 44, is in 1 *Atk.* 502 ; but much better reported, 8 *Vin. Ab.* 383. Pl. 36. Lord *Thurlow* C. disapproved of *Hall v. Terry*, in *Godwin v. Munday*, 1 *Bra.* 194 : and said that it cannot be reconciled with *Lowther v. Condon*, 2 *Atk.* 127 (cited page 45). It seems, however, that Lord *Thurlow's* observation applied only to the report of *Hall v. Terry*, in 1 *Atkins* ; although it, perhaps, may extend to that in *Vin. Ab.* ; which is, no doubt, accurate. Mr. *Sanders* suggests, in his note to *Hall v. Terry*, that the same remark seems to apply to other cases, and amongst the rest to the principal one of *Hodgson v. Rawson* ; and, indeed, comparing the two wills (and taking the report of *Hall v. Terry*, even from *Viner*,) the distinction is not very strong. Nevertheless, it must be observed that Lord *Hardwicke* has relied upon the distinction both in the principal case, and in several others. See in *Tunstall v. Bracken*, *Amb.* 169, &c.

Sherwin v. Collins, cited page 45, is in 3 *Atk.* 319.

A bequest
out of real
estate to be paid
within 12
months after the
[38]
death of A.
The legatee
survives A, but
lives only one
month after her.
The bequest
here held not to
lapse, and to go
to the repre-
sentative.
Vide Mr. Cox's
note 2P.W.612.

Lowther

HODGSON
versus
RAWSON,
Nov. 6, 1747.

Lowther v. Condon, *ibid.* 2 *Atk.* 127, and *Barn. Ch. Rep.* 327.

Van v. Clark, cited p. 46. 1 *Atk.* 510.

The Author of this Work has a manuscript note relative to the cause of *Manning v. Herbert*, which is shortly reported, *Amb.* 575, from whence it appears, that the circumstance of a clause of entry there was much relied upon. Lord Hardwicke, at page 46 of the principal case, states that as a "particular circumstance" in *Sherwin v. Collins* (reported 3 *Atk.* 319). The same note also states that, "the principal case above under-
"went a full consideration therein, and that the
"case of *Manning v. Herbert*, was determined
"chiefly upon its authority."

Wellock v. Hamond, cited p. 47, *Cro. Eliz.* 204.

[39]

King v. Withers, *ibid.* 46, 47. *Ca. Temp. Talb.* 117. 3 *P. W.* 414. *Prec. Ch.* 348. 3 *Bro. P. C.* 135, oct. ed.

Hutchins v. Foy, *ib.* 47, *Com. Rep.* 716. *S. P. Godwin v. Munday*, 1 *Bro.* 191.

Wilson v. Spencer, cited page 48, is imperfectly stated there. See the report 3 *P. W.* 172.

Lord Hardwicke said that *Tunstall v. Bracken*, *Amb.* 167. and 1 *Bro.* 124. note, was as near the principal case of *Hodgson v. Rawson*, as one case can be to another. See *Dawson v. Killet*, 1 *Bro.* 119; *Godwin v. Munday*, *ibid.* 191, and the cases cited in each. And see the note to 2 *P. W.* 612. Vide also *Roper* on Legacies, 1 Vol. 216 to 249, in which the material cases above referred to are stated fully and comprehensively.

MERITON *versus* HORNSBY, Nov. 9, 1747.

VOL. I.

NOTES AND OBSERVATIONS.

Page 48.

SEE *Baker v. Dennis*, *Salk.* 68. 6 *Mod.* 69. *S. C. Skinn.* 579.

(1) A Court of Equity will not relieve against the Master's legal right to all such earnings. See *Hill v. Allen*, 1 *Ves.* 83.

A master has a right to the earnings of his apprentice, who quits him, but it is to be enforced at law.(1)

SIBTHORP *versus* MOXTON, Nov. 10, 1747.

Page 49.

NOTES AND OBSERVATIONS.

S.C. 3 Atk. 580.

Sibley v. Cook, cited p. 49, 3 *Atk.* 572.

Elliot v. Davenport, *ibid.* 1 *P. W.* 86.

See several observations on the principal case, and those approaching it, or distinguishable from it, in *Toplis v. Baker*, 1 *Cox*, *P. W.* 86, note 2, 5th edition; which is now reported 2 *Cox*, *Ch. Ca.* 118.

As to what Lord *Hardwicke* says in the principal case above, p. 50, with regard to the form of a release being wanting, see also *Rider v. Wager*, 2 *P. W.* 331, 332. With respect to Lord *Hardwicke's* observation, p. 50, on *Elliot v. Davenport*, see 1 *P. W.* 85, 86.

A woman by will, forgives a bond and debt

[40]
to her son-in-law; and desires her executor to deliver up the bond to be cancelled; this held not to be lapsed, by his dying before the testatrix.

VOL. I.
 Page 51.

LEMAN *versus* NEWNHAM, Nov. 11, 1747.
 (Reg. Lib. 1747. B. fol. 123.)

NOTES AND OBSERVATIONS.

Exoneration.
 Incumbrances
 of an ancestor
 not a primary
 charge on the
 son's personal
 estate, although
 the latter had
 covenanted to
 pay them.

SEE the doctrine as to the application of the personal estate in case of the real, and the several distinctions as to the land becoming the primary fund, &c. &c. fully stated by Mr. Cox in a most able note to *Evelyn v. Evelyn*, 2 P. W. 663, in which all the material cases are collected.

In the principal case the Court declared, "that the several mortgages in the pleadings mentioned to have been assigned over to *Lucy Leman*, the Plaintiff's testatrix, were still subsisting mortgages; and referred it to the Master to take an account of what was due on them, &c. who in taking that account was to *distinguish what part* of the principal monies secured by the said mortgages, and the several assignments thereof, was *borrowed by*, and advanced to, and for the use and benefit of any of the *ancestors* of Sir *William Leman*, and the interest which had accrued due thereon; *and which part* of the said principal monies was *borrowed by*, or advanced to the said Sir W. L., or to and for his proper use and benefit, and the interest which had accrued due thereon. And also declared, *that so much* of the said principal monies as should appear to have been *borrowed by*, or advanced to and for the use and benefit of *any of the ancestors* of the said Sir W. L., together with the interest thereof, was *a charge on the lands and premises comprised in such mortgages*

[41]

gages and assignments, and ought to be raised and paid thereout. And that *so much* of the said principal monies as should appear to have been *borrowed by*, or advanced to, the said *Sir W. L.*, or to and for his proper use and benefit, and the interest thereof, *ought in the first place to be paid* and satisfied out of *the personal estate of the said Sir W. L.*, and in case the said personal estate should not be sufficient to pay the same, then the residue of the said last-mentioned principal monies and interest ought to be raised and paid out of the said mortgaged premises, and *decreed* the same accordingly: and referred it to the Master to tax all parties their costs of the suit. And an account was directed, in case the Plaintiff should not admit assets of *Sir W. L.* come to the hands of *Lucy Leman* his executrix, or of the Plaintiff, her executor, &c. And in case the Plaintiff, her executor, should not admit assets to answer the same, then an account was directed as to the personal estate of *Lucy Leman* come to his hands, &c. And upon the Defendant *Newnham's* paying unto the Plaintiff a moiety of what should be found due for such part of the said principal money and interest as should be found to be the debt of any of the ancestors of the said *Sir W. L.*, and also a moiety of such part of the said principal monies and interest as should be found to be the proper debt of the said *Sir W. L.* so far as the same should not be satisfied out of his personal estate, and also a moiety of the said costs within six months after the Master's report, the Plaintiff was ordered to assign the mortgaged premises to a trustee, to be approved of by the Master, upon trust to attend upon and protect the freehold and inheritance of the

LEMAN
versus
NEWNHAM,
Nov. 11, 1747.

LEMAN
versus
NEWNHAM,
Nov: 11, 1747.

the said mortgaged premises ; but in case the Defendant should make default, then the mortgaged premises, or a sufficient part thereof, was to be sold and the monies applied as above-mentioned, *mutatis mutandis*, and, after payment thereof, if there should be any overplus, one moiety should be paid to the Plaintiff, and the other moiety to the Defendant. *Reg. Lib.*

Practice of the
Six Clerks'
Office.

Entry in
Bill-book.

[43]

Vide page 53, as to the point of practice, where Lord *Hardwicke* expresses it merely as his opinion, that an entry of the bill filed in the Six Clerks' Office is necessary to ground an attachment for non-appearance to it. The Author of this Work has to observe, he finds upon inquiry from the Clerks in Court, that *such an entry is indispensably necessary* to give the party notice ; and that an attachment issued without such an entry would be discharged forthwith. There are *two books* kept in the Six Clerks' Office. The bills *which are filed* are entered in *one of them* ; and of these the Defendant must take notice. In *the other* are contained merely the titles of bills *which are not filed*, but on which some process has issued ; and this latter is kept for the sake of Defendants, who may prefer costs if they have entered an appearance.

As to Mr. *Vesey's* observation at the top of page 54, see the Act for Amendment of the Law, 4 *Ann. c. 16. § 22.*

WALKER *versus* WALKER, Nov. 17, 1747.
(*Reg. Lib.* 1747. B. fol. 439).

VOL. I.
Page 54.

NOTES AND OBSERVATIONS.

THE report states the Settlor to have purchased the copyhold *estates* after making the settlement. It appears, however, from *Reg. Lib.* that he purchased and was admitted to *two copyhold estates immediately before* the execution of the settlement; and that he purchased, and was admitted to *the other copyhold estate about a year after* its execution.

Wife barred of *Free-bench* by settlement under agreement before marriage to accept it in lieu of Dower, or thirds.

The statute of *Henry VIII.* referred to by Lord *Hardwicke* in p. 54, is 27 *Hen. VIII. c. 10. § 6.* Vide *Gilb. Ten.* 182. *Vizard v. Langdale*, cited p. 55, is also cited 3 *Atk.* 8.

Lord *Hardwicke* lays down the law in p. 55, that a bare devise of land to a widow, without more, will not operate as a bar of dower. As to some of the cases in support of it, see *Lawrence v. Lawrence. Lemon v. Lemon*, 8 *Vin. Ab.* 366. Pl. 45. *Hitchin v. Hitchin*, *Prec. Ch.* 133. *Galton v. Hancock*, 2 *Atk.* 427. *Tinner v. Tinner*, 3 *Atk.* 8. *Incedon v. Northcote*, *ibid.* 436. *Ayres v. Willis*, 1 *Ves.* 230. *Charles v. Andrews*, 9 *Mod.* 152. *Broughton v. Errington*, 7 *Bro. P. C.* 461. *Pitts v. Snowden*, 1 *Bro.* 292, note. *Pearson v. Pearson*, *ibid.* and the notes *ibid.* to Mr. *Bell's* edition. But it is not absolutely requisite that a testator, &c. should expressly declare that the devise, &c. shall be a satisfaction of it. It is sufficient that it appears evidently from circumstances; as, where allowing a double provision would disappoint, or materially affect a will.

Dower—what shall be a bar of, &c.

[44]

Arnold

WALKER
versus
WALKER,
Nov. 17, 1747. *Arnold v. Kempstead, Amb. 466, and 1 Bro. 292, note S. C. Villa Real v. Lord Galway, Amb. 682, and 1 Bro. 292, note. Jones v. Collier, Amb. 730. Wake v. Wake, 3 Bro. 255. In such cases the widow must make her election.*

VOL. I.

Page 56.

LORD UXBRIDGE *versus* STAVELAND,
November 25, 1747.

(*Reg. Lib. 1747. A. fol. 339, 340. entered under its proper title, Earl of Uxbridge, v. Statham.*)

NOTES AND OBSERVATIONS.

Demurrers.—
One on the
ground of
forfeiture.

Others, as to
account of corn
ground at other
mills, and to a
Decree that all
corn should be
[45]
ground at the
Plaintiff's mill.

THE statement in the report as to the demurrers is not accurate, or satisfactory. The Defendant put in *four* demurrers; the first was on the ground of forfeiture, and was allowed as there stated.

The *nature* of the second is not mentioned in *Reg. Lib.* but it is stated to *have been over-ruled*.

The third and fourth were allowed. They were to the relief, for want of equity. The third, applied to an account sought of tolls of corn and grain ground at other mills, and to a Decree, praying that the defendant might be obliged to grind all her corn and grain at the Plaintiff's mill. The fourth applied to a like prayer in respect of malt. *Reg. Lib.*

In page 56, Lord *Hardwicke* observes, that in order to bind "assigns" by a bill upon a covenant, the bill must expressly allege them to be so bound, or it will be demurrable.

It is so likewise in the case of an heir. See *Crosseing v. Honor, 1 Vern. 180. Et vide Shep. Touchst. 376: 378.*

VANE

VANE *versus* VANE, Nov. 25, 1747.

(Reg. Lib. 1747. B. fol. 95, 96.)

VOL. I.

Page 57.

NOTES AND OBSERVATIONS.

It was declared, that the Plaintiffs had no share or interest in the Defendant's share of the surplus in question: and the bill was dismissed without costs. *R. L.*

Construction of a trust.— Surplus Rents, &c. not included in the term "Portion."

MADDISON *versus* ANDREW, Nov. 27, 1747.

(Reg. Lib. 1747. B. fol. 119.)

Page 57.

NOTES AND OBSERVATIONS.

SEE most of the cases on the execution of Powers, and upon Illusory Appointments collected, and much dwelt on in *Butcher v. Butcher*, 9 *Ves.* 382. 397; and more especially in that case as it came before Lord *Eldon* C. on appeal, 1 *Ves.* and *Beames* 79.

As to what appears in p. 60, 61, relative to circumstances rebutting a resulting trust, see also the case of *Pole v. Pole*, 1 *Ves.* 76, *et post.* (59.) See also *Murless v. Franklin*, 1 *Swanst.* 13.

lease takes it in the names of his brother and himself, paying the fine and receiving the profits himself. Held not to be assets, but vested in the brother beneficially, upon the ground of intention, though proved but by one witness.

Power to charge a particular sum reserved by owner of the inheritance not executed in his lifetime, held to be executed in substance by his will, charging debts and legacies on all his real and personal estate though it did not refer to the power. Illusory trust.

Power. Illusory appointment. [46] "Legacy given to the children" of S, she then having but one; held for the benefit of all born, or to be born. Testator on renewal of a

MADDOX

VOL. I.

Page 61.

MADDOX *versus* MADDOX, Dec. 5, 1747.(Reg. Lib. 1747. B. fol. 575, entered "*Maddox v. Betten.*")

NOTES AND OBSERVATIONS.

Party having notice through his agent, of sufficient to make him inquire as to the title, cannot protect himself by procuring the legal estate.

Attorney, &c. may object to answer as a witness as to confidential communications.

[47.]

It appears from the statement of the pleadings in *Reg. Lib.* that besides this, and what may be called a *provisional* execution of the power of charge, by way of mortgage, as noticed in p. 61 of the report, *E. M.* actually devised "the 200*l.* which he had a power to charge, &c. to be divided amongst his younger children." These consisted of the Plaintiff and his three sisters. The latter, by their answer to the cross bill, insisted, "that if the 200*l.* should not be applied to dis-encumber the premises in B. it ought to go according to their father's will, and that thereby they were entitled to several shares thereof."

See as to this, the Decree stated from *Reg. Lib. post.*

Betten by his answer, insisted he was entitled to the tenement in question, "for that the Plaintiff's father in the lifetime of his grandfather, agreed to settle all the real estate that should descend to him at the death of his father, and believed the settlement was made in pursuance thereof, with general words whereby his father *intended* to perform his said agreement, and that the tenement in B. ought to have been included."

By the Decree it was (*inter alia*) declared, "that the premises in B. were not comprised in the settlement, but passed to the Plaintiff by the will of his father *subject* to the said mortgage for 200*l.*"

200*l.* and interest thereon, together with his power of charging 200*l.* on the settled estate; and that the burthen of the mortgage ought to be borne in equal proportions, rateably between the premises in B. and the sum of 200*l.* chargeable on the settled estate. An account was directed as to what was due on the mortgage; and the Plaintiff was to be at liberty to redeem. In case he did so, the Master was to settle the proportions of what should be found due for the 200*l.* and interest, which ought to be respectively borne by the premises in B. and the 200*l.* charged on the settled estate by virtue of the power; regard being had to the difference of value between the premises in B. and the 200*l.* and regard also being had to the money that should have been applied out of the rents and profits of those premises towards discharging, or sinking the 200*l.* or the interest thereof; and such sum as the Master should settle to be the proportion of what should be found due for the 200*l.* and interest, which ought to be borne by the settled estate, by reason of the power, together with such further sum as should make up the principal money of such proportion, to the amount of 200*l.* with interest for such further sum, from the death of *Edward Maddox* the father, was directed to be raised by mortgage or sale of the settled estate; which, when raised, was to be equally divided between and paid to the Plaintiff and his sisters, share and share alike." *Reg. Lib.*

MADDOX
versus
MADDOX,
Dec. 5, 1747.

[48] .

As to the examination of a Counsel, Solicitor, or Attorney, as a witness, see *Gwillim, Bac. Ab.* 2 Vol.

579, 580. Mr. *Gwillim* makes there an observation of some weight on the passage in the report on this point, inasmuch as it would seem from thence

Evidence.

Objections as to the examination of Counsel, Solicitors, &c. as witnesses.

MADDOX
versus
MADDOX,
Dec. 5, 1747.

thence, that the right to object were the privilege of the Attorney, &c.; whereas the obligation to silence is for the sake of the client; and he then proceeds to notice, that a Court of Law will itself stop the witness whenever he discovers an anxiety to reveal the confidential communication of his client, 4 *T. R.* 759; and that the Courts of Equity will suppress such depositions. *Sanford v. Remington*, 2 *Ves.* Jun. 189.

[49]
VOL. I.
Page 63.

BANKS versus DENSHIRE, Dec. 9, 1747.
(*Reg. Lib.* 1747. A. fol. 306.)

NOTES AND OBSERVATIONS.

Copyholds
unsurrendered
by mistake;
Surrender
supplied in
favour of a
younger child.

Nota. The necessity of surrender is now dispensed with. (1)

(1) A CONSIDERABLE alteration has been lately made in the law relative to Copyholds, by the Stat. 55 Geo. III. ch. 192., which dispenses with the necessity of a surrender in respect of all Testators dying after the passing of that Act, upon payment by the persons intitled or claiming of all duties, fees, &c., that would have been due and payable in case a surrender had been made. It is also to be noticed that it *seems most advisable* to surrender to the use of the will, in every case where it can be done, notwithstanding the benefit of the Act. See *Scriven* on Copyholds, 129. The Act in question is inserted, *ibid.* p. 610.

The devise was *not* to the Plaintiff *Banks*, &c. as stated in the report, but was *to the testator's daughter*, who married *Banks*, and the heirs of her body. *Reg. Lib.*

After so much of the will as appears in the report,

report, *Reg. Lib.* states "he directed that, as well
"the said freehold, as the said copyhold estate,
"should be subject to an annuity of 50*l.* to the
"Defendant his son [who was also his heir] for
"life."

BANKS
versus
DENSHIRE,
Dec. 9, 1747.

The question was, whether the want of a sur-
render should be supplied *in favour of the daugh-*
ter as a younger child, &c. *Reg. Lib.*

The case mentioned in the report as of the King's
Head Inn in Turnham Green is *Gascoigne v. Bar-*
ker, 3 *Atk.* 8. *Allen v. Poulton*, there mentioned,
is 1 *Ves.* 121; but it is observable this case must
have been added by the reporter subsequently, as
it was not decided until very nearly a year after
the principal case.

In the principal case, the Court declared, "that
"the copyhold tenement was comprised in the
"devise, &c. to the testator's daughter, the
"Plaintiff *Mary*:" and decreed accordingly.—
Reg. Lib.



LE NEVE *versus* LE NEVE, Dec. 9, 1747.

(*Reg. Lib.* 1747. *B. fol.* 109.)

NOTES AND OBSERVATIONS.

(1) THE bill stated (*inter alia*) that *Edward*
Le Neve neglected to register the articles, &c.
which ought to have been done, in order to a
complete execution of the articles, and to prevent
the premises being incumbered; and that he,
taking advantage of his own neglect in not regis-
tering the articles, &c. made and registered the
several mortgages, and the settlement, on his

E

second

[50]
VOL. I.

Page 64.
S.C. 3 *Atk.* 646.
and Amb. 436.

Notice to an
Attorney of a
prior conveyance
unregistered
will postpone a
conveyance
for the benefit
of the principal
which has been
registered.
Notice to agent
is notice to a
party. (2)

LE NEVE
versus
LE NEVE,
Dec 9, 1747.

second wife, charging notice, &c. as in the report. It prayed, That the Defendant might deliver up the pretended marriage articles and settlement, and all other writings, &c. relating to the title of the said premises ; or in case the said conveyance should appear to have been made upon a good and valuable consideration, and without such notice as was charged in the bill, then that the Defendant, the father, might settle lands of equal value to the said premises to the like uses as were limited by the original articles, or make the Plaintiffs such other compensation as the Court should direct, and that he might be obliged to register the said articles, and the settlement, &c. in pursuance of, and to the uses of, the articles, and according to the Statute. *Reg. Lib.*

(2) *Jennings v. Moor*, cited p. 65, from 2 *Ver.* 609, is S. C. on appeal, *Dom. Proc.* with *Blenkarne v. Jennens*. 2 *Bro. P. C.* 278, octavo edit. See also *Maddox v. Maddox*, 1 *Ves.* 62. 2 *Ves.* 370, &c.

[51]

Such notice must, however, be *in the same transaction*. Vide *Fitzgerald v. Falconbury*, *Fitzgib.* 207. *Lowther v. Carlton*, 2 *Atk.* 242. *Warrick v. Warrick*, 3 *Atk.* 294. *Worsley v. E. of Scarborough*, *ibid.* 392. *Steed v. Whitaker*, *Barn. Ch.* 220.

No Decree on one witness only, against a denial by answer equally positive, uninfluenced by other circumstances.

Though it is generally true that a point supported only by one witness cannot be maintained against a positive denial in an answer. *Hobbs v. Norton*, 1 *Vern.* 136. *Alam v. Jourdan*, *ibid.* 161. ; yet it is so merely where the denial is as express and positive as the testimony, and there are no corroborative circumstances. *Walton v. Hobbs*, 2 *Atk.* 19. *Janson v. Rany*, *ibid.* 140.

Only

Only v. Walker, 3 *Atk.* 407. *Arnot v. Biscoe*, 1 *Ves.* 97. Vide also *Pember v. Mathers*, 1 *Bro.* 52. 6 *Ves.* 40. *ib.* 177. 183, 184. 9 *Ves.* 275, &c. 12 *Ves.* 78. 80. &c.

LE NEVE
versus
LE NEVE,
Dec. 9, 1747.

(2) See this point *per* Lord *Hardwicke*, in the Report, p. 69; and also in *Hill v. Ballard*, 1 *Ves.* 77. Lord *Eldon* C. expressed the same doctrine, in *Alsager v. Rowley*, 12 March, 1802. Editor's MS. note. But this subject escaped the notice of Mr. *Vesey*. It will be seen from that gentleman's report of *Alsager v. Rowley*, 6 *Ves.* 748. that there was a manifest collusion between the Defendants; and Lord *Eldon's* observations above reported by the Editor, apply to the end of the paragraph at p. 751. See further also *per* Lord *Eldon*, in *Morse v. Royal*, 12 *Ves.* 355. 361. 362.

The Court often gives credit to the answer of one party, even against another, so as to make it the foundation of an enquiry. (2)

Lord Forbes v. Denniston, cited p. 67, is S. C. with 4 *Bro. P. C.* 189, octavo edit. and 13 *Vin. Ab.* 550, and 19 *Vin. Ab.* 514.

Difference between the Registry Acts for England and Ireland.

There is a material difference between the Register Act for Ireland and those in England. By the Irish act, 6 *Ann. c. 2.* an absolute priority is expressly given to the instruments first registered. Vide *Sch. & Lefr. Rep.* 98. *Et ibid.* 159, 160.—The registry of a deed in Ireland is not, of itself, notice, *ibid.* 90. 157.

Blades v. Blades, cited p. 68, is in *Eq. Ab.* 358. pl. 2.

Chivals v. Niccols, cited *ib.* is 1 *Stra.* 664.

"Fraus nemini patrocinari debet," (page 68.) Vide *Co. 3 Rep.* 178. b.

In addition to the cases cited, or referred to, on the Registry act, vide *Wrighton v. Hudson*, 2 *Eq. Ab.* 609, before Sir *Joseph Jekyll*. *Bacchus v. Bacchus*, cited *Amb.* 680. 2 *Atk.* 275. *Amb.* 624.

[52]

LE NEVE *ibid.* 678. *Appendix to Sch. & Lefr. Rep.* 467.
 versus 3 *Ves.* 478 4 *Ves.* 389. 9 *Ves.* 407.
 LE NEVE,
 Dec. 9, 1747.

VOL. I.

Page 70.

SPERLING *versus* TOLL.

(Reg. Lib. 1747. B. fol. 121.)

NOTES AND OBSERVATIONS.

Money to be laid out in land considered as land. Executory trust for three for their lives, as tenants in common; If any died without issue living at their deaths, their shares to go to survivors; with contingent remainders in tail; and remainders over. Two of them dying in testatrix lifetime, Held their shares lapsed, and went over.

THE Court declared "that two-thirds of one moiety of the lands to be purchased with the surplus of the testatrix's estate, which by her will were limited after the death of *W. T.* her brother, to *W.* and *John T.* her nephews, who died in the lifetime of their father, without issue, belonged to the following persons and their heirs, viz. seven tenth parts thereof unto *A. W.*, *M. W.*, *S. T.*, *E. W.*, *J. W.*, *A. W.*, and *E. W.*, and their heirs, as tenants in common; and that the remaining three tenth parts of the said shares of such moiety belonged to the Defendant *W. T.* the infant, and his heirs, as he was the heir at law of *W. T.* the elder, who was heir at law of the said testatrix, the other devisees thereof having died in her lifetime; and the Master was to see the same settled accordingly: and the remaining one-third of such moiety was to be settled upon the Defendant *W. T.* the infant, as directed by the will. *Reg. Lib.*

ATTORNEY GENERAL *versus* SMART,
March 4, 1747-8.

[53]
VOL. I.
Page 72.

NOTES AND OBSERVATIONS.

(1) VIDE *Attorney General v. Parker*, ante, 37. and 1 *Ves.* 43. and the cases 2 *Ves.* 328, and 11 *Ves.* 241. 247. 365. 367. 372. with *Attorney General v. Mayor of Stamford*, 2 *Swanston*, 591.

(2) Vide *Attorney General v. Parker*, 1 *Ves.* 43, et antea [37].

(3) See *Attorney General v. Middleton*, 2 *Ves.* 327. *Attorney General v. Talbot*, 1 *Ves.* 72, et post, 57. *Ex parte Kirkby v. Ravensworth Hospital*, 15 *Vesey*, 305, &c. *Attorney General v. E. Clarendon*, 17 *Ves.* 491. 498. and the case of *Birkhampstead School*, 1 *Ves.* and *Beames* 134.

The late act for the regulation of Charities upon a Petition instead of an Information, is the 52 *Geo. III. c. 101.*

That act does not affect third persons, such as parties claiming under a lease, &c. sought to be set aside, &c.—*Burnham Charity Case*, Lincoln's Inn Hall, Dec. 7, 1814, &c. So that in such cases the relief must be sought by information.

There must always be some Relators before the Court to answer the event of costs. See *Prec. Chan.* 42.

Where a Decree for the establishment of a charity should be made, an information will not be dismissed because it prays wrong relief (1); but the Court of Chancery will not act in many cases (2) and has no jurisdiction in many others, as Foundations under a Charter, &c. (3).

VOL. I.

Page 73.

STEPHENS *versus* TRUEMAN,
March 5, 1747-8.

(Reg. Lib. 1747. B. fol. 257.)

NOTES AND OBSERVATIONS.

In marriage articles and settlements, on good and valuable consideration, it will run through all the limitations, so as to enable

[54]
the remotest remainder man to sue for a specific performance, &c. (1)

(1) *Ithall v. Beane*, 1 *Ves.* 215. *et post*, 114. *S. P.* *Johnson v. Legard*, 3 *Mad. Rep.* 283, &c. seems *contrà*. *Sed quære*. *Vide etiam Sutton v. Chetwynd*, 3 *Meriv.* 249.

The case of *Vernon v. Vernon*, cited page 73, was affirmed in *Dom. Proc.* *Vide* 1 *Bro. P. C.* 267, octavo edit.

Fagg v. Nash, cited *ibid.* is *S. C.* with *Goring v. Nash*, 3 *Atk.* 186.

See those cases also, 1 *Ves.* 216: Mr. *Sanders's* note to *Goring v. Nash*, 3 *Atk.* 188, and *Nairne v. Prowse*, 6 *Ves.* 752.

The very ground of the decisions is that stated by Lord *Hardwicke* in the principal case, p. 74, namely, "that agreements are entire, and the "several branches might have been in view."

Lord *Hale* lays down the doctrine as prevailing accordingly in the cases of *actual* settlements in *Fursaker v. Robinson*, as it is reported in *Hardr.* 395; which case, as reported in *Prec. Chan.* 475, had been cited against the claim in the principal case.

Costs paid to disinherited heir, raising a fair question, and avoiding useless expence.

As to the subject of costs, at the end of the report, page 74, the Decree expresses it thus—
"The Defendant not having put the Plaintiff to
"the expence of any examination, nor to any
"unreasonable expence in the cause, it is ordered,
that

"that the Defendant, upon executing the said
"conveyances, be paid his costs of this suit, to be
"taxed." R. L.

STEPHENS
versus
TRUEMAN,
Mar. 5, 1747-8.

POLE versus POLE, March 8, 1747-8.

(Reg. Lib. 1747. B. fol. 305.)

VOL. I.

Page 76.

NOTES AND OBSERVATIONS.

THE eldest son's cross bill was dismissed, with costs. In the original suit it was declared, "that he ought to be considered as a trustee in the mortgage in question, for his father; and he was directed to pay the costs of that suit, so far as the same related to the question concerning the right to the mortgage money." Reg. Lib.

A father having provided for his eldest son, but not for the rest, takes a security

[55]
for the proceeds of an estate sold in the name of himself and eldest son—
Held a trust for the father's personal representatives.

Though the general rule is, that on a purchase by one man in the name of another, the nominee shall be a trustee for the purchaser, such resulting trust is not only liable to be rebutted by slight evidence, as in *Maddison v. Andrew*, 1 *Vesey*, 60. 61. but an express case of exception to such rule is formed where the purchaser is under a species of natural obligation to provide for the nominee, as in the case of a parent, &c. child unprovided for. Vide *Scroop v. Scroop*, 1 *Ch. Ca.* 27; *Stileman v. Ashdown*, 2 *Atk.* 477. and note; and *Murless v. Franklin*, 1 *Swanston's Rep.* 13. 17. &c. Mr. *Swanston* observes, that "*Grey v. Grey* (1 *Ca. Ch.* "296. *Rep. temp. Finch*, 338. and 2 *Freeman*, 6.) "is one of the earliest and most important authorities on the doctrine of advancement, in application

POLE
versus
POLE,
Mar. 8, 1747-8.

"plication to purchases by a father in the name
"of a son." 2 *Swanst.* 591. Appendix. Mr.
Swanston afterwards subjoins in the same Appen-
dix to that volume of his most useful and elabo-
rate Reports, an extract of the important case of
Grey v. Grey, which he had thus noticed, from
Lord Nottingham's MSS., observing that the printed
Reports in Chancery Cases, *Finch* and *Freeman*,
are extremely imperfect. *Vide* Appendix to 2
Swanst. 594.

Where even no such natural obligation exists,
the Court has suffered the resulting trust to be
rebutted in favour of the nominee, by slight evi-
dence. See in *Maddison v. Andrew*, 1 *Ves.* 60. 61.

VOL. I.
Page 77.

HILL versus BALLARD, March 9, 1747-8.
(*Reg. Lib.* 1747. A. fol. 292.)

NOTES AND OBSERVATIONS.

On the marriage
of A. his sister
advances him
600*l.* to make
a present to his
wife, and A.
procures his
father to give
her a bond for
the amount
payable at a
month after his
death.
A. pays his
sister interest
during his fa-
ther's lifetime,
and for the
month

(1) THE report is erroneous at page 78, in
stating that no costs were decreed against the
father's representatives. It appears from the Re-
gistrar's Book that the *latter were ordered to pay
the Plaintiff her costs*; and that a cross bill by
them was dismissed, with costs as to the Plaintiff,
and without costs as to the brother.

The original bill was filed by the sister against
the representatives of the father Sir *Isaac Shard*,
and her brother. It appears from the pleadings
(*inter alia*) that the intended wife of the latter
Defendant, being entitled to a considerable for-
tune, the same, and a considerable real estate
proceeding

proceeding from the Defendant's father, were settled on the marriage; and that the Defendant, wishing to make a suitable present to his intended wife, requested his father to advance him 600*l.* for the purpose; who refused to advance the money; but agreed, on its being advanced by his daughter, to secure its repayment to her after his death; which being done, he executed an obligation, whereby "he bound himself, his heirs, &c. to pay to his said daughter, her heirs, &c. the sum of 600*l.* of lawful money, at one month after his decease." It also appears that the Plaintiff afterwards advanced a further sum of 200*l.* in like manner, upon which Sir Isaac added the following words at the bottom of the instrument, viz. "I do, upon a further consideration, promise to pay 200*l.* more, to make the above 600*l.* 800*l.* to be paid at the afore-said time, without interest." The son paid interest for these sums during his father's lifetime, and for the month afterwards. The father's representatives insisted (*inter alia*) upon the circumstance of Sir Isaac having actually settled all he had engaged to do by the treaty preceding the marriage, and that no consideration was stated in the instrument. Their answer also contained much irrelevant matter. They also filed a cross bill, which was dismissed with costs, as above, &c. In the original cause the two sums were decreed to be paid the Plaintiff by Sir Isaac's representatives, with interest from the end of one month after his death, and her costs. *R. L.*

(2) In illustration of what Lord Hardwicke observes in the report in the principal case p. 77. and to the same point in *Le Neve v. Le Neve*, 1 *Ves.*

HILL
versus
BALLARD,
Mar. 9, 1747-8.

[56]
month after-
wards.

On a bill by the sister against the representatives of her father and her brother.

Held, a debt on the estate of the father, not to be indemnified by A. And the Plaintiff was also decreed her costs out of her father's estate.

(1)
Aliter, if such a transaction had been between strangers.

Accounts, memoranda, &c. of the father read in favour of his representatives, although objected to by the other Defendant as likely to affect him.

How answer of one Defendant may affect another Defendant. (2)
As to securities, &c. in fraud of marriage agreements. (3)

HILL
versus
BALLARD,
Mar. 9, 1747-8.

[57]

69. (noticed in this Supplement, *ante*, 57.) as to admissions in the answer of one Defendant having in their consequences affected other Defendants, the Editor has here also to notice, that Lord *Eldon* C. directed an answer of that nature to be read accordingly, in *Alsager v. Rowley*, Lincoln's Inn Hall, March 12, 1802; observing, "that although an answer cannot be read as *positive evidence* against a Co-defendant, it may yet be used for the purpose of showing a contradiction in the different statements, or a disagreement in accounts, so as to lay a ground for inquiry." Auth. MS Note. *Alsager v. Rowley*, is in 6 *Ves.* 748, but this point is unreported.

(3) As to the case mentioned by Lord *Hardwicke*, of securities taken, or private understandings, in fraud of marriage agreements, see *Pitcairn v. Ogbourne*, 2 *Ves.* 375, and *Troughton v. Troughton*, 1 *Ves.* 86. *et post.* 64.



VOL. I.

Page 78.

ATTORNEY GENERAL *versus* TALBOT,
March 25, 1747-8.

(Reg. Lib. 1747. A. fol. 620.)

S.C. 3 Atk. 662.

NOTES AND OBSERVATIONS.

Chancery has no jurisdiction to interfere with the election of Members of Colleges, or misapplication of their funds, &c. where the appointment of

(1) VIDE *Attorney General v. Smart*, 1 *Ves.* 72, *et antea* [53], and *Green v. Rutherford*, 1 *Ves.* 462. 472, &c. Also the cases referred to in *Attorney General v. Dixie*, 13 *Ves.* 519. *Kirkby v. Ravensworth Hospital*, 15 *Vesey*, 305, &c. *Attorney General v. E. of Clarendon*, 17 *Ves.* 491. 498, &c. Case of *Berkhampstead School*, 2 *Ves.* & *Beames* 134, &c.

(2)

(2) The plea was *in the first place* to the whole of the relief, and after stating at length the Statutes of the University, it averred " that the said statutes were all the statutes which any way related to the constitution of a Visitor of the said College, or Hall; nor was there in any charter, deed, evidence, paper, or writing, to the Defendant's belief, any thing which related to the appointment of a visitor of the said college or hall [save] as aforesaid. And Defendant was advised, and insisted that the said Chancellors of the University ever since had been Visitors of the said College or Hall; and that the most noble Charles Duke of Somerset then was the Chancellor of the said University of Cambridge, and also then was the Visitor of the said College or Hall, and of the Master, Fellows, and Scholars of the said College or Hall; and that the said Chancellor for the time being, his Deputy, or Vice Chancellor for the time being, had, with the advice and consent of two Doctors (if any such there were) or otherwise of two Masters of Arts, one a Regent, and the other a Non-regent Master, to be assigned by the University, as assessors or assistants assumed to him for all the time aforesaid, as Visitor of the said College or Hall, upon appeal to him made for that purpose, had heard, adjudged, and determined, and of right ought to hear, adjudge, and determine, all disputes, complaints, and controversies, of and concerning the election and admission of any person into the place of one of the Fellows or Scholars of the said College, and of and concerning all other matters and things relating to the rules and good government of the

" said

ATTORNEY
GENERAL
versus
TALBOT,
Mar. 25, 1747-8.
[58]
a general
Visitor can be
inferred. (1)
Plea that the
Chancellor of
the University
was Visitor of
Clare Hall to
the whole relief
and discovery
of such an
information,
supported.
No precise
words requisite
to constitute
a general
Visitor. (2)

ATTORNEY
GENERAL
versus
TALBOT,
Mar. 25, 1747-8.
[59]

“ said College; and that such complaints, disputes, and controversies, had not been, and ought not to be heard, adjudged, or determined, before any other Court or Judicature, or in any other manner whatsoever; and that at the time of the election of the said Defendant into the place of one of the Fellows of the said College or Hall, and long before, and ever since, the said most noble *Charles* Duke of Somerset was, and he then was, the Chancellor and Visitor of the said College. And that the Relator R. M. had not appealed to the said Chancellor, as Visitor of the said College or Hall, nor elsewhere, to hear and determine the right of election and admission of him the said Defendant into the place of one of the Fellows of the said College or Hall, as he might and ought to have done; and that the said Chancellor had power and authority to compel him, the said Defendant, to make a full answer upon oath to all such matters as should be complained of against him touching the election or admission of Fellows into the said College or Hall, and all other matters relating thereto, and to enforce a production of all statute books, papers, and writings whatsoever, in the said Defendant’s custody or power, relating to any controversy touching the election or admission of any Fellows into the said College or Hall, and particularly relating to the election of him the said Defendant, or the said Relator R. M. into the place of one of the Fellows of the said College or Hall. And as to so much of the said Information as prayed any discovery of the several matters therein severally mentioned, set forth, or alleged, save and except
“ such

"such part thereof as charged the Defendant with
"any unjust combination, or confederacy, the
"Defendant by further plea, insisted on the several
"matters before pleaded and set forth." *Reg. Lib.*

(3) See 15 *Ves.* 309. 314, &c.

ATTORNEY
GENERAL
versus
TALBOT,
Mar. 26, 1747-8.
[60]

ATTORNEY GENERAL versus WYCLIFFE,
January 26, 1747-8.

(*Reg. Lib.* 1747. A. fol. 363.)

VOL. I.
Page 80.

Nomination of
a master to a
charity school
not subject to
the general
rules of lapse, as
in cases of pre-
sentation
to livings.

OWEN versus DAVIES, February 1, 1747-8.

(*Reg. Lib.* 1747. B. fol. 451.)

Page 82.

NOTES AND OBSERVATIONS.

(1) It seems to have been the practice in such cases for the Court to Decree the lunatic to execute when he recovered his understanding, the party to hold and enjoy in the mean time. *Pegge v. Skinner*, Ch. May 22, 1784, 1 *Cox. Ch. Ca.* 23. But now, by Stat. 43 Geo. III. ch. 75, the Lord Chancellor may order the freehold and leasehold estates of the lunatic to be sold, or charged by way of mortgage, or otherwise, for payment of creditors, and performance of contracts, &c. and the costs and charges thereof; and may direct the committees to execute conveyances, and to procure admittances to, and make surrenders of, copyholds, &c. It is, however, provided by the
6th

Specific per-
formance of
agreement
against one who
afterwards
became a
lunatic. (1)

OWEN
versus
DAVIES,
Feb. 1, 1747-8.
[*61]

6th sect. that the act is not to subject such estates *to debts or demands, otherwise than as the same were then liable unto by due course of law; but only to authorise the Lord Chancellor to make orders in the above cases, when the same should be deemed for the lunatic's benefit.

There must be some mistake in the report at bottom of page 82, where it is supposed that the instrument had not been signed by the Plaintiff or his agent: for the bill stated, that the original agreement was signed by the Plaintiff's agent as well as by the Defendant, and the agreement as stated in the bill, is admitted by the answer of the committee. The party, however, who became afterwards a lunatic, confirmed the original agreement by a writing, which was signed only by him. Both the original agreement and the confirmation were proved in the cause. *Reg. Lib.*

In the second clause of Lord *Hardwicke's* Judgment, his Lordship properly reprobates the agreement made amongst the lunatic's next of kin, as to the disposal of the purchase money. It may be right to observe, that the Lord Chancellor in administering a lunatic's funds, never adverts to any contingent interest of the next of kin; but, on the contrary, will apply the whole if it contributes to the lunatic's comfort or convenience; taking care, however, his creditors are not prejudiced. *Dormer's Case*, 2 *P. W.* 262. 265. *Ex parte Chumley*, 1 *Ves. Jun.* 296. *Oxendon v. Lord Compton*, 2 *Ves. Jun.* 72. *Ex parte Baker*, 6 *Ves.* 8.

And even as to creditors, the Lord Chancellor will not make an Order, which will have the effect of reducing the lunatic to a state of absolute want. *Ex parte Dikes*, 8 *Ves.* 79. For

[62]

For a few other points as to alterations of the Law by statutes relative to lunatics, it may be observed, that by the 4 *Geo. II. c. 10.* Lunatics, &c. or their committees, were enabled to assign over their trusts and mortgages, and might be ordered to make conveyance, &c. by *direction of the Lord Chancellor.*

OWEN
versus
DAVIES,
Feb. 1, 1747-8.

By 29 *Geo. II. c. 31.* Lunatics, their Guardians, &c. may, by *Order of the Courts of Equity* surrender leases, and accept renewals.

By the 36 *Geo. III. c. 90. § 3.* Stock in the name of lunatics, or their committees, may be ordered in certain cases to be transferred.



HILL *versus* ALLEN, February 3, 1747-8.

(*Reg. Lib. 1747. A. fol. 263.*)

NOTES AND OBSERVATIONS.

(1) SEE *Meriton v. Hornby*, 1 *Ves.* 48, *et ante.*



DAVIES *versus* BAILY, February 8, 1747-8.

(*Reg. Lib. 1747. A. fol. 266.*)

NOTES AND OBSERVATIONS.

THE words of the limitation were “to such of his relations as would be entitled thereto by the laws in force concerning the distribution of intestate’s estates in case he had died intestate, to be divided as the said laws direct.”

(1)

VOL. I.

Page 83.

The Court will not relieve against a master’s legal right to all the earnings of his apprentice, who quitted his service during his indentures.
(1)

Page 84.

Bequest of residue to trustees, the widow to have the interest for life; and after her death the residue to be divided amongst such of testator’s relations

as

DAVIES
versus
BAILY,
Feb. 8, 1747-8.
[*63]
as would have
been entitled
under the statute
of Distributions
if he had died
intestate.
The widow's
representatives
excluded from
any share. (1)

VOL. I.

Page 85.

Bequest of a
contingent in-
terest in per-
sonalty void,
where the pre-
ceding gift
never vested,
owing to a
lapse.

*(1) *Garrick v. Lord Camden*, S. P. 14 *Ves.* 372.
Vide *Green v. Howard*, 1 *Bro.* 33. Et vide
Worseley v. Johnson, 3 *Atk.* 758. So likewise,
where a person gives amongst "his relations," this
does not include those by affinity, such as brothers-
in-law, &c. *Maitland v. Adair*, 3 *Ves.* 231. If,
however, an intention to include them can be
clearly collected from the will, it will prevail; for
the statute is substituted only where the intention
cannot be made out. *Greenwood v. Greenwood*,
1 *Bro.* 30. 32, note.

MILLER versus FAURE, February 10, 1747-8.
(*Reg. Lib.* 1747. B. fol. 254.)

MILLAR versus TURNER,
Hil. T. February 11, 1747-8.

Page 85.

(*Reg. Lib.* 1747. B. fol. 532.)

NOTES AND OBSERVATIONS.

A posthumous
child within a
provision in
marriage arti-
cles for such
children of the
marriage as
should be living
at the death of
the father or
mother.

A POSTHUMOUS Child may take under the statute
of Distribution, &c. as living at the intestate's
death, *Wallis v. Hodson*, 2 *Atk.* 114, and *Barn. Ch.*
271. So may a posthumous brother of the half-
blood, *Burnet v. Mann*, *postea* 85, and 1 *Ves.* 156.

A Child *en ventre sa mere* may take under a
bequest to all Children of B. born in the lifetime
of Testatrix. *Trower v. Butts*, 1 *Sim.* and *Stu.* 181.
So it may obtain an injunction to stay waste. See
in

in *Musgrave v. Parry*, 2 *Vern.* 710. Mr. *Raithby's* edition. It prevented a remainder taking effect, which depended upon the death of the father, without leaving issue. *Burdet v. Hopegood*, 1 *P. W.* 487. A limitation to it for life, with remainder over in tail in strict settlement, will be good, *Long v. Blackall*, 3 *Ves. Jun.* 486. 7 *T. R.* 700. S. C. and see 4 *Ves.* 322, &c. It may be the subject of Warranty. *Co. Litt.* 390 *a.* So of Murder, 3 *Inst.* 50, 51.

MILLAR
versus
TURNER,
Hil. T. Feb. 11.
1747-8.
[64]

As to the principal point, it was determined in *Hale v. Hale*, *Prec. Ch.* 50, that such a child was entitled to the benefit of a charge for raising portions for children living at the death of the testator. And it seems that the question, whether they could take a share in a fund bequeathed to children under a general description "of children living at the testator's death," was not finally settled in the affirmative (See *Freemantle v. Freemantle*, 1 *Cox. Ch. Ca.* 248.), until the case of *Clarke v. Blake*, 2 *H. B. Rep.* 399, 2 *Bro.* 320, and 2 *Ves. Jun.* 673. S. C.

An illegitimate Child *en ventre sa mere*, is capable of being so described as to take by grant. *Rolle's Abrid.* 43. title "Grant," D. 11. See *Gordon v. Gordon*, 1 *Merivale*, 141. and *Earle v. Wilson*, 17 *Ves.* 528.

VOL. I.

Page 86.

S.C. 3 Atk. 656.
quod vide;Settled estate
disencumbered
of a charge in
fraud of a
marriage
agreement. (1)TROUGHTON *versus* TROUGHTON,
February 23, 1747-8.

(Reg. Lib. 1747. B. fol. 352.)

NOTES AND OBSERVATIONS.

This case is fully stated, and much better reported in *Atkins*.

(1) See *Daubeney v. Cockburn*, 1 *Merivale*, 626.

The statement in 1 *Ves.* 86, is not correct. It appears from *Reg. Lib.* and is so stated in *Atkins*, that the obligation to re-convey part of the estate, or pay 300*l.* &c. was *by a separate* instrument, executed on the same day as the settlement; being a joint bond from the husband and wife. See the case as reported in 3 *Atk.* 656, with those cited in the argument, and the Decree, &c.

[65]

Page 88.

SHISH *versus* FOSTER, *et E contra*,
February 26, 1747-8.

(Reg. Lib. 1747. B. fol. 241.)

NOTES AND OBSERVATIONS.

A stated account
and release be-
ing set aside,
relief not given
to the defendant
on a cross bill
for another in-
dependent
matter, until he
should fully
account in the
original suit.

THE Defendant Foster was ordered to pay the Plaintiff *Shish* his costs of the two suits so far as they related to the accounts of the Plaintiff's father's personal estate, and the Plaintiff's real estate, up to the hearing: the Court reserving the consideration of subsequent costs, and the whole costs of the cross cause, so far as they related to the copyhold estate, until after the Master's report. *R. L.*

TIL-

TILBURGH *versus* BARBUT, March 2, 1747-8.

VOL. I.

Page 89.
S.C. 3 Atk. 617.

NOTES AND OBSERVATIONS.

VIDE *Fearne Ex. Dev. 4th edit.* 116, *et seq.*
Also 179, 180, &c. And see Mr. *Sanders's* note to
the principal case in 3 *Atk.*

Devise to A.
and his heirs ;
and if he died
without heirs,
remainder to B.
The devise
being clearly of
a fee, the re-
mainder is void.

MENDES *versus* MENDES, March, 11, 1747-8.

Page 89.

(*Reg. Lib.* 1747. B. fol. 200.)

NOTES AND OBSERVATIONS.

(1) SEE *Hawes v. Hawes*, 1 *Ves.* 13, *et antea*
(15), and *Stones v. Heartly*, 1 *Ves.* 165, *post.*

Liberal con-
struction in fa-
vour of the
vesting of
portions (1).
Survivorship
as between the

children referred to their not attaining 21, or marriage, though no express words
to that effect ; there being a preceding clause as to other children, where the
like words were used.

BENSON *versus* DEAN & CHAPTER of YORK,
February 29, 1747-8.

[66]

Page 91.

(*Reg. Lib.* 1747. A. fol. 654.)

NOTES AND OBSERVATIONS.

THE Court (*inter alia*) ordered, that if the Costs.
Defendants " should put the Plaintiff to any
" further trouble in carrying the Decree into
" execution, the latter should be at liberty to
" apply to the Court for his costs." *R. L.*

VOL. I.

Page 93.

REVEL *versus* WATKINSON, June 11, 1748.

NOTES AND OBSERVATIONS.

Tenant for life must keep down the interest of incumbrances, although the whole of the rents and profits are exhausted by it. (1) The Court, however, will direct a reasonable maintenance for him out of the profits, if otherwise unprovided for.

(1) *S. P. Tracy v. Lady Hereford*, 2 Bro. 128, Mr. *Bell's* edition.

See *Hungerford v. Hungerford*, *Gilb. Rep.* 69. But it is otherwise in the case of tenant in tail, *Amesbury v. Brown*, 1 Ves. 477. 480. There is, however, a distinction where the tenant in tail is an infant, and his guardian or trustee is in possession of the profits of the estate; inasmuch as, in the first place, the infant cannot bar the remainder, like other persons; and, in the next, the act of the guardian shall not alter his property, or that of those coming after him.—*Sarjeson v. Cruise*, cited by Lord *Hardwicke*, 1 Ves. 480, and reported 2 *Atk.* 412. Vide *ibid.* 414, note, and 416, and the notes. *Chaplin v. Chaplin* (as to this point) seems over-ruled by *Sarjeson v. Cruise*. Nevertheless as to this, see 1 Ves. 480. *Tracy v. Lady Hereford*, 2 Bro. 128. is S. P. but it is rather curious that the principal case was not adverted to at either of the hearings. Ex inform.—Et vide the report.

[67]

There is an inaccuracy at the top of page 94, of the report, where Lord *Hardwicke* is reported to state as law, “the words, ‘rents and profits,’ “used generally, without more, imply a power to “sell;” referring to *Ivy and Gilbert*, 2 P. W. 13. The report in the latter case does not warrant such a conclusion. On the contrary, it states that “the natural meaning of the words is by ‘yearly profits,

"profits;" and that the word '*profits*' had in some "particular instances been extended to any profits, &c. to prevent inconvenience." In corroboration of this doctrine, see the cases referred to by Mr. Cox's note to *Trafford v. Ashton*, 1 P. W. 418, and the note to *Conyngham v. Conyngham*, post, 221.

REVEL
versus
WATKINSON,
June 11, 1748.

ARNOTT versus BISCOE, June 13, 1748.

(Reg. Lib. 1747. A. fol. 528.)

VOL. I.
Page 95.

NOTES AND OBSERVATIONS.

(1) THE bill stated that *Biscoe* in the first place had (*inter alia*) assured the Plaintiff that "the premises were free from incumbrances." And in another part charged that upon the vendor's wishing for part of the purchase money beforehand, *Biscoe*, to induce its advance, assured the Plaintiff that "the premises were not subject to any incumbrances, or that such incumbrances would soon be discharged." *Biscoe's* answer stated, that (in respect of the first meeting between the parties) "he did then, and at such time, as he believes, acquaint the Plaintiff of the incumbrance, &c." and afterwards, that "he believed he did the like in the presence and hearing of the Plaintiff's own Attorney."—The other material parts of the bill he denied in terms more positive.

The issue was also to ascertain "whether *Biscoe* gave notice to the Plaintiff of a Decree of Foreclosure

Attorney on sale of an estate not disclosing to the buyer an incumbrance, and leading him to suppose the title would be a good one, held liable to make satisfaction in default of the vendor. (1) Though one witness cannot sustain a suit against a distinct denial by answer, the latter must be precise and positive. (2).

[68]

ARNOTT
versus
BISCOE,
June 13, 1748.

closure which had been made in that court."
Reg Lib.

(2) See the note to *Le Neve v. Le Neve, antea*,
50.

VOL. I.

Page 97.

Bequest by an
E. I. captain of
all household
furniture (1),
linen, plate,
and apparel,
includes only
what is for do-
mestic use, and
not any articles
for trade or
merchandize.
Construction as
to the words
"or" and
"and."
Medals (2)
when to pass
by a bequest of
money, &c.

LE FARRANT *versus* SPENCER,
June 14, 1748.

(*Reg. Lib.* 1747. *A. fol.* 680.)

NOTES AND OBSERVATIONS.

THIS case is entered under the title of "*Far-
rant v. Spencer.*"

(1) See *Hele v. Gilbert*, 2 *Ves.* 430.

(2) See *Bridgman v. Dove*, 3 *Atk.* 201.

The case of *D. Beaufort v. Lord Dundonald*, 2
Vern. 739, is cited in the report. Lord *Hard-
wicke* said in *Bridgman v. Dove*, that he laid very
little stress on it. 3 *Atk.* 202.

Page 99.

A debt by cove-
nant in mar-
riage articles,
and no mention
of interest.—
The Court
would not re-
duce it lower
than 5 *per cent.*
The like inter-
est allowed also
upon a legacy
for mourning.

SWYNFEN *versus* SCAWEN,
June 18 and 22, 1748.

(*Reg. Lib.* 1747. *B. fol.* 393.)

NOTES AND OBSERVATIONS.

This was on a re-hearing as to the above points,
when Lord *Hardwicke* affirmed his Decree. *R. L.*

CLARKE *versus* SAMSON, June 21, 1748.

(Reg. Lib. 1747. A. fol. 714.)

[69]

VOL. I.

Page 100.

NOTES AND OBSERVATIONS.

(1) EXPRESSIO unius est exclusio alterius." Edit.
The ulterior limitation in the settlement was
"to such person or persons as should be his own
"right heir, or to such other persons as might
"claim the same under the will of his father."
R. L.

The Court (*inter alia*) directed an account of the personal estate of *John Samson* the father, received by *John Samson* the son, or the Defendant *James S.* the latter's executor, &c. And in case it should appear that *J. S.* the son paid any of the debts of *J. S.* the father, out of his own estate, then the Defendant, his executor, was to stand in the place of the creditors so paid off, to receive a satisfaction, *pro tanto*, out of the personal estate of *J. S.* the father. And what should be coming on the balance of the account of the personal estate of *J. S.* the father come to the hands of *J. S.* the son who was to be answered by the Defendant, his executor, out of his assets, in a course of administration; and if there should be any surplus of the personal estate of *J. S.* the father, it was to be considered as part of and carried to the account of the personal estate of *J. S.* the son. The Master was also to take an account of the personal estate of *J. S.* the son, received by the Defendant, his executor, &c. &c. And he was likewise to take an account of the rents

Settlement, on marriage, of estates, leasehold and others, subject to incumbrances.

The issue of the marriage not entitled to have them disincumbered out of their father's assets.

The word "grant" does not amount to an entire warranty in equity; nor always at law, where particular covenants are inserted.

In such cases the insertion of what is express, excludes the intendment of all presumption. (1).

CLARKE
versus
SAMSON,
June 21, 1748.
[*70]

*rents and profits of the real estate of *J. S.* the father descended to *J. S.* the son, accrued since the death of *J. S.* the father, which had been received by *J. S.* the son, or the Defendant, his executor, &c. And what should be coming on the said account was to be applied in payment of the debts of *J. S.* the father which should remain unsatisfied by his personal estate not specifically bequeathed. And if any of the creditors by specialty of the said *J. S.* the father should exhaust his personal estate in satisfaction of their debts, the simple contract creditors were to stand in their place to receive a satisfaction, *pro tanto*, out of the real estate. *Reg. Lib.*

VOL. I.
Page 101.

SAVILLE versus TANKRED, June 21, 1748.
(*Reg. Lib.* 1747. B. fol. 395.)

NOTES AND OBSERVATIONS.

Parties—
to a bill by
representative
of pawnee
of a chattel
against a third
person merely
for a delivery
of it, the owner
need not be
made a party.

THE hearing of the cause came on about a week after this objection.

It appears that the jewels had been placed in Mr. *Saville's* hands by way of collateral security for a sum of 3000*l.* and had been left by him in the house of the persons to whom the Defendant was the representative; and with whom he lodged, till his death. Those persons had been in the habit of paying and receiving money for him for a great length of time, and the same circumstances took place also between the Plaintiff and the Defendant as representatives to the several parties. Accounts had been from time to time regularly settled

*settled between the original parties ; and an account had likewise been settled between the Plaintiff and Defendant, in which a balance was admitted to be due to the Plaintiff. The Defendant, however, by her answer, said there had been an omission of a charge in the several settled accounts for the standing of the iron chest, which contained the jewels, in a room in her house, which, from an apprehension that the chest contained things of great value, she had not thought it safe to let to any person as she might otherwise have done. She therefore insisted upon having a reasonable satisfaction made her for the same. But the Court decreed, “ the Defendant to pay to the Plaintiff “ the balance of the money account in the pleadings mentioned, she having admitted assets ; and “ that the iron chest with the labels with the title “ of the cause affixed thereto, which had been deposited in the Bank, and placed to the credit of “ the cause by virtue of an Order of, &c. should be “ delivered out of the Bank, with the privity of “ the Accountant General to the Plaintiff, or to “ such person as she should authorise by letter of “ attorney for that purpose, which Decree was to “ be without costs on either side.” *R. L.*

SAVILLE
versus
TANKRED,
June 21, 1748.
[*71]

(1) See *Clark v. Guise*, 2 *Ves.* 617. 618. *et postea* 245.

MARRYAT versus TOWNLY, June 27, 1748.

(*Reg. Lib.* 1747, *B. fol.* 479.)

VOL. I.

Page 102.

[72]
VOL. I.
Page 106.

MILNER *versus* MILNER, June 11, 1748.

(Reg. Lib. 1747. B. fol. 561.)

Page 108.

ARNOLD *versus* CHAPMAN, June 12, 1748.

(Reg. Lib. 1747. A. fol. 649.)

NOTES AND OBSERVATIONS.

Mortmain.
Assets not marshalled in favour of a bequest to a charity, void under the statutes, as charged on real estate.
(1)

(1) VIDE also *Attorney General v. Graves, Amb.* 158, and *Attorney General v. Tomkins, ib.* 216. Lord Hardwicke there observes, "If there are general legacies, and the testator has charged his real estate with payment of all his legacies, the personal estate being insufficient to pay the whole, the Court has said that the legacy to the charity shall be paid out of the personal estate, and the rest out of the real, that the will of the testator may be performed in *toto*:" and in another case, 2 *Ves.* 53, His Lordship says, it allows marshalling as above, when there are two different funds for payment of the debts and legacies. But it is settled that the Court will not thus marshal assets where the bequest to the charity is absolutely contrary to law. See *Mogg v. Hodges*, 2 *Ves.* 52. *Attorney General v. Tindal, Amb.* 614. *Foster v. Blagdon, ibid.* 704. *Hillyard v. Taylor, ibid.* 713. *Middleton v. Spicer*, 1 *Bro.* 201. *Attorney General v. E. of Winchelsea*, 2 *Bro.* 373. and the valuable note of the judgment in that case by Mr. Le Mesurier in Mr. *Belt's* edition of Brown

Brown, p. 380. note (3). See also *Makeham v. Hooper*, 4 Bro. 153, and the references.

ARNOLD
VETUS
CHAPMAN,
June 12, 1748.

The case mentioned in the principal one, page 109 and 110, as on the will of Sir John James, is that of the *Attorney General v. Lord Weymouth*, Amb. 20.

Roper v. Ratcliffe, cited p. 110, is in 9 *Mad.* 190. 10 *Mad.* 237; and 5 Bro. P. C. 360. Octavo Ed. Quod vide.

[73]

ELLISON *versus* AIREY, July 13, 1748.

(Reg. Lib. 1747. A. fol. 699.)

VOL. I.
Page 111.

NOTES AND OBSERVATIONS.

(1) THE Court declared “ that by the death of *E. P.* before she attained the age of 21 years, or “ was married, the said legacy vested in, and be- “ longed to the three children of *F.* who were “ living at the time of the death of the said *E.* ; “ to be equally divided between them; and the “ Master was to compute interest thereon from the “ time of the said *E. P.*’s death.” *R. L.*

Heathe v. Heathe, cited in the Report, is in 2 *Atk.* 121.

It seems that the general rule is, that where the bequest to the children is *general*, and not limited to a particular period, it is then confined to the death of the testator; but where it is to one for life, or where the distribution is postponed to a future time, those children are let in, who are born during the life, or before that time. See the authorities

Legacy of 300*l.* to *E.* to be paid at 21, or marriage; but if she died before, then to the younger children of *F.* *E.* having died unmarried under 21, held to vest in such of the younger children as were living at that time. (1)

ELLISON
versus
ATREY,
July 13, 1748.

authorities on each head, collected by Mr. Sanders,
2 *Atk.* 122, note (2).

VOL. I.
Page 115.

STOCKWELL *versus* TERRY, July 15, 1748.

(*Reg. Lib.* 1747. B. fol. 491.)

[74]
Page 118.
S.C. 3 *Atk.* 645.

FONNEREAU *versus* FONNEREAU,
August 5, 1748.

(*Reg. Lib.* 1747. A. fol. 520.)

NOTES AND OBSERVATIONS.

Legacy to F.
when he shall
attain 25 ; with
directions that
it shall be in-
vested, and its
interest paid, in
the mean time
for education,
and for part of
the principal to
place him out,
is a vested inter-
est, and trans-
missible,
though he died
before that age.
(1)

THE question came before the Court on pe-
tition.

(1) On the distinction between the actual vest-
ing of legacies where the *time of payment only* is
postponed, and where the precise time is *of the*
substance of the gift, see *Roper* on Legacies,
1 Vol. 216, &c. Mr. Cox's note 2 *P. W.* 612.
And Mr. Sanders's note to *Steadman v. Pulling*,
3 *Atk.* 427, and to the principal case 3 *Atk.* 645,
note 2. Likewise *Hanson v. Graham*, 6 *Ves.* 239:
242. 245.

Lundy v. Williams, cited in the Report, is in
2 *P. W.* 480, and *Attorney General v. Hall*, *ibid.*
is in 8 *Vin. Amb.* 103. pl. 50.

BARNESLY *versus* POWEL, Aug. 5, 1748. VOL. I.
(Reg. Lib. 1747. A. fol. 641.—And Reg. Lib. 1748. A. fol. 583, 584.) Page 119.

NOTES AND OBSERVATIONS.

THE Trial was at Bar in K. B. and appears from *Reg. Lib.* to have lasted several days. After a full hearing, the Jury found that the paper writing, dated, &c. was *not* duly published by the said *W. B.* deceased, as his last will and testament, and signed by him, and attested and subscribed in his presence by three credible witnesses; and they found upon the second issue, that the two other paper writings, bearing date respectively, &c. were *not* sealed and delivered by the said *W. B.* deceased. They moreover stated that they grounded their verdict on *forgery*, and not on any particular defect in the execution of the will.

See also 1 Ves. 284. et postea. Issues as to the forgery of a will and other instruments.

[75]

The cause came on again before Lord *Hardwicke*, upon the equity reserved on the 10th of July, 1749, when it was (*inter alia*) decreed, that all the agreements, &c. &c. obtained from the Plaintiff should be set aside, and be delivered up to be cancelled, and that the said Defendants should be restrained from making use of, or insisting upon the Decree made in the Court of Exchequer, and from claiming any benefit thereby; and the Defendants were ordered to deliver up possession of the real estate in question, &c. and to pay the Plaintiff his costs of the suit, and his costs at law. *Reg. Lib.* 1748. A. fol. 583, 585. As to the sentence in the Prerogative Court, the Defendant was ordered to consent to a reversal of it,

BARNESLY
versus
POWELL,
Aug. 5, 1748.

it, &c. &c. See 1 *Vesey*, 284, *et postea*, 143.
As to setting aside Decrees in Equity, on the
ground of fraud, &c. see *Richmond v. Taylor*, 1 P.
W. 734. 736.

[76]
VOL. I.

Page 121.

ALLEN *versus* POULTON, October 25, 1748.

(Reg. Lib. 1748. A. fol. 317.)

Sir W. Fortescue, M. R.

NOTES AND OBSERVATIONS.

Trust of a copy-
hold devisable
without a sur-
render. As to
another copy-
hold of which
the testator had
the legal estate,
heir put to his
election. (1)

(1) See *Cockes v. Hellier*, *post*, 127, 128, and
the notes.

Besides the legacies to the eldest son, the tes-
tator devised to him his manor of Westbury in
the parish of Barking (which was an estate in fee
simple), "and all other his freehold estate, mes-
suages, lands, tenements, tythes, and heredita-
ments in the said parish, for the term of four-
score years, if he should so long live; and from
and after his decease he gave the said manor to
the Plaintiff for life." He made no disposition
of the reversion, which descended upon the De-
fendant as his eldest son and heir.

The bill stated, that the Defendant did all he
could to frustrate his father's will, although he
was (*inter alia*) amply provided for by the said
will, and also by his father's suffering the re-
version of his freehold estate to descend to him;
and, after submitting that no surrender of the
trust copyhold estate to the use of the will was
necessary, or could be made by the testator, it
insisted, as to the copyhold not surrendered, that

a

a surrender ought either to be supplied in favour of the Plaintiff, or that at least the Defendant ought not to be permitted to claim under the said will, and in contradiction to it; but that he must abide by, and submit to, the said will entirely, or relinquish all he was entitled to under it; whereas he had received his legacy of 500*l.* and also part of his share of the residue of the testator's estate under the will.

ALLEN
versus
POULTON,
Oct. 25, 1748.

[77]

The Defendant by his answer insisted, that he might well take such estates as descended to him as heir, and likewise such real and personal estates as were devised to him; nor did he apprehend, that his taking the estates as heir at law would at all controul or contradict the said will. He also stated (*inter alia*) that neither of the copyhold estates appeared to have been intended to pass by the will; for that the testator was an attorney at law, and very well knew the necessity of a surrender, &c.: and that as the testator did not intend to devise all his estate by his said will, which most clearly appeared by his devising only estates for life out of his freehold estates, suffering the reversion thereof to descend on the Defendant, so the testator intended the said copyhold premises might descend in the same manner.

The Court ordered the Defendant to surrender the two copyhold estates in question to the Plaintiff at the Plaintiff's expence, &c.; and did not give costs on either side. *R. L.*

The case cited of the King's Head Inn, Turnham Green, is *Gascoigne v. Barker*, 3 *Atk.* 8. That of *Banks v. Denshire*, is in 1 *Ves.* 63. *et antea* 49. Vide *Blunt v. Clitherow*, 10 *Ves.* 589.

Though an heir will be put to his election in the

ALLEN
versus
POULTON,
Oct. 25, 1748.

[78]

Election as to
estates at com-
mon law.

the case of unsurrendered copyholds, *ut supra*, and in *Cookes v. Hellier*, 1 *Ves.* 234, *et post* 127, 128; and in *Unett v. Wilkes*, *Amb.* 430, and *Rumbold v. Rumbold*, 3 *Ves.* 65, &c. yet it is otherwise in regard to freeholds or *real estates at the common law*, when the will is incompetent to pass them on account of a want of due execution, attestation, &c.: or of infancy, &c. *Hearle v. Greenbank*, 3 *Atk.* 695, 715. *Sheddon v. Goodrich*, 8 *Ves.* 481, 496; and the reason seems to be, that in the latter case, the will being void as far as respects the land, cannot be looked at to ascertain an intention relative thereto; whereas it is otherwise as to copyholds.

But even in the case of freehold lands under such a will, the heir will not be allowed to claim a legacy, if the testator has imposed an express condition, that the legatee shall forfeit his interest if he does not comply with the will in toto. *Vide Boughton v. Boughton*, 2 *Ves.* 12. *et postea.* 248.

For a comprehensive view of the doctrine of election, and most of the decisions on it, see Mr. *Swanston's* able and elaborate note to *Dillon v. Parker*, 1 *Swanst. Rep.* 394, &c.



VOL. I.
Page 123.

REECH versus KENNEGAL, Oct. 26, 1748.

(*Reg. Lib.* 1748. *B. fol.* 234.)

THE case of *Whitton v. Russel*, as cited and stated p. 124, was on appeal from the Rolls, and was in affirmance of His Honour's Decree, *Reg. Lib.* 1738, *B. fol.* 520. The entry of the original Decree

Decree (*Reg. Lib.* 1736, *B. fol.* 527) is very short, being that merely of a Dismission of the bill: but it is proper to state, that a draft of the bond mentioned in the report *had been prepared*. A paper writing appears entered as read at the original hearing, which purports to be the "draft of a bond, prepared for the execution of the Defendants, *Harrison and Russell, and Abraham Collyer.*" *R. L.*

REECH
versus
KENNEGAL,
Oct. 26, 1748.

The Editor has a MS. note upon the passage at the bottom of p. 125, and top of p. 126, of the principal case, referring to one of *Rann v. Hughes* as a Judgment delivered in the Exchequer Chamber, *Trin. Term, 1776.*

[79]

BINGHAM *versus* BINGHAM, 27 Oct. 1748.
(*Reg. Lib.* 1748. *A. fol.* 154.)

VOL. I.
Page 126.

NOTES AND OBSERVATIONS.

THE material facts were as follows: One *John Bingham* (*inter alia*) devised an *estate tail*, in certain lands, to *Daniel* his eldest son and heir, limiting the *reversion in fee to his own heirs*. *Daniel* left no issue, but devised this estate to the Plaintiff in fee. The bill stated, that the latter, being ignorant of the law, and persuaded by the Defendant, and his scrivener and conveyancer, that *Daniel* had no power to make such devise, and being also subjected to an action of ejectment, purchased the estate of the Defendant for 80*l.*; and that it was conveyed to him by lease and release. The Bill was to have this money repaid

Equity relieves
against bar-
gains made un-
der a miscon-
ception of
rights. (1)

BINGHAM
versus
BINGHAM,
Oct. 27, 1748.

with interest. The Defendant, by his answer, first of all insisted, that Daniel had no power to make such devise; but if he had, he urged, that the Plaintiff should have "been better advised" before he parted with his money, for that all "purchases were to be at the peril of the purchaser." The Decree was for the money, with interest and costs. *R. L.*

(1) See also *Cocking v. Pratt*, 1 *Ves.* 400, *post*, 176. *Ramsden v. Hylton*, 2 *Ves.* 304, *post*, 350. *Evans v. Llewellyn*, 2 *Bro.* 150. and 1 *Cox. Ch. Ca.* 333. The judgment is given more at length by Mr. *Cox*, p. 339, than it is in the report by Mr. *Brown*. See also Mr. *Bell's* notes in his edition of *Brown*, 2 vol. 150.

[80]

VOL. I.

Page 127.

PEACOCK versus MONK, Oct. 28, 1748.

(*Reg. Lib.* 1748. *B. fol.* 126.)

NOTES AND OBSERVATIONS.

Deed and will executed on the same day; the deed held a testamentary act, and as voluntary and void against creditors under the 13 *Eliz.*

Parties—

Not necessary to make any other than the executor parties relative to the personal estate;

THE bill (*inter alia*) insisted, "that the 4000*l.* by virtue of the deed, became the property of Monk, subject to the covenants; and that it was not to be considered as part of Admiral Lestock's assets, or subject to his debts; and that the Plaintiffs were in nature of creditors of Monk, but unable to sue him at law, by virtue of the said securities being made in manner aforesaid." *R. L.*

The Court (amongst other things) "declared the Plaintiffs, *Peacock* and *Cockburn*, were entitled to the said several sums of 1000*l.* and interest, from the end of two months after the death

"death of Admiral L.; and that the Plaintiff,
 "Mrs. Knowles, was entitled to her annuity,
 "&c. &c. as against the defendant, *William*
 "*Monk, as executor of Admiral Lestock, and also*
 "against all the said testator's legatees, and any
 "other persons not claiming under the said Admi-
 "ral Lestock for valuable consideration; but that
 "the Plaintiffs ought to be postponed, as to all
 "creditors for valuable consideration of the said
 "Admiral Lestock." R. L.

PEACOCK
 versus
 MONK,
 Oct. 28, 1748.
 tate; since he
 sustains the
 power of the
 testator to de-
 fend the estate
 for himself, cre-
 ditors, and le-
 gatees.

BUTTERFIELD *versus* BUTTERFIELD,
 Oct. 29, 1748.

(Reg. Lib. 1748. A. fol. 75.)

[81]
 VOL. I.
 Page 133
 and 154.

NOTES AND OBSERVATIONS.

On appeal from the Rolls, where it had been heard by consent.

It appears from *R. L.* that the words in the latter clause were, "if he should die without is-
 "sue;" not "*heirs*;"

The Master of the Rolls, upon John Butterfield's having waved any right which he might have to the money, had decreed, that the stock in which this 400*l.* had been invested, should be transferred to a trustee or trustees, &c. who were to pay the interest, &c. to the Plaintiff for life; and who, upon his death, were to transfer the stock to his children, if he should have any; and if he should die without issue, they were to transfer it to his executors or administrators. This decree was re-

Interest of money given to A. for life, and for the heirs of his body, with a limitation over, if he died without issue. A. takes the whole, the limitation being too remote. (1) Judgment in a cause heard by consent reversed on appeal. (2)

BUTTERFIELD
versus
BUTTERFIELD,
Oct. 29, 1748.

versed, and the stock ordered to be transferred to the Plaintiff. *R. L.*

(1) Vide also *Flanders v. Clarke*, 1 *Ves.* 9, and the note upon it, *antea*, 12. Lord *Beauclerc's* case, cited p. 134, is in 2 *Atk.* 308.

(2) This was refused in *Harrison v. Rumsey*, post, 391. *Downing v. Cage*, 1 *Eq. Ca. Ab.* 165. *Bradish v. Gee*, *Ambler* 229. *Norcot v. Norcot*, *Dom. Proc. Feb.* 1702. *MS. Salk.* and 7 *Vin. Ab.* 398. See also *Wall v. Bushby*, 1 *Bro.* 484.

[82]

VOL. I.

Page 135.

OKE versus HEATH, November 4, 1748.

(Reg. Lib. 1748. A. fol. 215. Entered
Oke v. Gill.)

NOTES AND OBSERVATIONS.

A wife having power to appoint 4000*l.* to any of her kin; and, for want of appointment, to go according to the statute, appoints it by will to her nephew, "upon condition" (1) that he paid his mother an annuity of 100*l.* She then bequeathed to her niece S. *all the*

(1) THE words in *R. L.* are as here, "upon condition that he paid."

(2) See *Wigg v. Wigg*, 1 *Atk.* 382, and *Hills v. Wirley*, 2 *Atk.* 605. This latter case is the one cited in the Report, p. 136, as decided 6 July, 1746.

Burnet v. Holgrave, mentioned pp. 137 and 140, as in *Eq. Ca. Ab.* 296, is imperfectly reported there. Vide 2 *Ves.* 80.

Upon the distinctions between *trusts* and *powers*, vide in *Brown v. Higgs*, 8 *Ves.* 561, 570, &c.

rest and residue of what she had power to dispose of. The nephew dying in her life-time, the appointment as to him was void, but not so as to the annuitant, (2) and the remainder was held to pass by the above residuary bequest.

BAGSHAW

BAGSHAW *versus* SPENCER, Nov. 12, 1748.

(Reg. Lib. 1748. A. fol. 152.)

VOL. I.

Page 142.

NOTES AND OBSERVATIONS.

THE case of *Lord Say and Seal v. Lady Jones*, cited p. 144. is in 8 *Vin. Ab.* 262. 1 *Eq. Ab.* 389, and 3 *Bro. P. C.* 113, octavo ed. On appeal from the Rolls; vide 2 *Atk.* 570.

Long v. Beaumont, cited p. 147, is in 3 *Bro. P. C.* 60. octavo ed.; and there called "*Darbison v. Beaumont*." Devise.

Coulson v. Coulson, cited also p. 147, is in 2 *Stra.* 1125. 2 *Atk.* 246, &c. Vide *Hodgson v. Ambrose*, *Dougl.* 323, S. P. Lord *Hardwicke's* observations on *Coulson v. Coulson*, in the next page, if "*this case be law*," might be thought merely casual, and as implying no doubt of the decision; but from what follows, the author thinks his lordship meant to shew somewhat of a dissatisfaction. The Author is in possession of a copy of *Strange's Rep.* which formerly belonged to Mr. *Bearcroft*, and there is a MS. note on the case of *Coulson v. Coulson*, in Mr. *Bearcroft's* hand-writing, as follows—"In the case of *Chapman on dem. of Oliver v. Brown*, Lord *Mansfield* mentioned the case of *Coulson v. Coulson*, and the said determination gave great dissatisfaction to the Bar; and also that upon a similar occasion Lord *Hardwicke* made a case to be sent to the Court of K. B. to be solemnly argued; 'and he told me' (said my Lord *Mansfield*) 'that he never was satisfied with the determination, though he would not himself determine against it without the opinion of the Court. E. B.'" Limitations apparently legal as [83] uses executed, held to be trusts from the purposes to be answered; by a preceding devise to trustees for payment of debts, &c. Question as to whether an estate for life, or in tail.

Lisle

BAGSHAW
versus
SPENCER,
Nov. 12, 1748.

Lisle v. Gray, cited p. 149, is in 2 *Lev.* 223, and *Raym.* 278. *Sir J. Hobart v. E. of Stamford*, is in 19 *Vin. Ab.* 360. *Fearne Cont. Rem.* [173] and 3 *Bro. P. C.* 31, octavo ed.

Ashton v. Ashton, cited also p. 149, was on a re-hearing, 14 Nov. 1734. *Reg. Lib.* 1734. *A. fol.* 151.

Strict settle-
ment.

[84]

The Court there, after the declaration of its being an estate for life in G. I. A. directed a conveyance in strict settlement accordingly "to his use for life. Rem. to trustees, to preserve, &c. " Rem. to his first and other sons in tail general. " Rem. to his daughters in tail, as tenants in com- mon, and not as joint tenants; with cross re- mainders over. Rem. in fee to the Defendant, " *R. A. R. L. fol.* 152."

Withers. v. Algood, cit. p. 150, is in *R. Lib.* 1734. *B. fol.* 276.

It should be observed, upon the principal case of *Bagshaw v. Spencer*, that Lord *Thurlow* said he was not satisfied *with the reasons* of the determination. Vide in *Jones v. Morgan*, 1 *Bro.* 217, 221, 222.

See also *Fearne, Cont. Rem.* [166], [207], [211], [215], &c. &c.

VOL. I.

Page 154.

BUXTON versus SNEE, November 15, 1748.
(*Reg. Lib.* 1748. *A. fol.* 176, entered " *Buxton v. Sidebotham.*)

NOTES AND OBSERVATIONS.

No lien on a
ship, or pro-
ceeds from sale
of

(1) It appears from the ultimate decision of *Sansum v. Bragginton*, reported 1 *Ves.* 443, that where

where the vessel was hypothecated for repairs *done abroad*, and afterwards lost, the part-owners were held personally liable respectively. They were first, as between themselves, to contribute according to their respective shares; and under a deficiency contemplated in respect of one of the parties, the other was held responsible, *as if he had been a partner*. Vide *Reg. Lib.* 1749, *B. fol.* 373, &c. Lord *Hardwicke* followed a like course in *Doddington v. Hallett*, 1 *Ves.* 497, and seems, upon the very face of the record, to have gone much too far in so doing: since the agreement between the part-owners (*whom he treated as partners*,) as it appears in *Reg. Lib.* expressly negatived any such conclusion. They thereby covenanted and agreed “*severally, and not jointly, every one for himself*.” (See *postea* () the notes on that case.) It seems now, however, *to be settled*, on great consideration, and by several decisions, that Lord *Hardwicke* was wrong in considering part-owners as partners; and that the determination in *Doddington v. Hallett* is to be considered as over-ruled. Vide *Exparte Young*, 2 *Ves.* and *Beames* 242, per Lord *Eldon C.* and *Exparte Harrison in m. of Nicholson*, 2 *Rose Rep. in Bankruptcy*. *Brent v. Hay*, Feb. 10, 1815, &c. &c.

As to the maritime law on hypothecation, and the general liability of the owners, see *Molloy*, 213. *Salk.* 34, pl. 7. *Garnham v Bennett*, 2 *Stra.* 816. *Morse v. Shue*, 1 *Ventr.* 190, 228. *Spearing v. Degrave*, 2 *Vern.* 643. *Cary v. White*, 5 *Bro. P. C.* 325, octavo ed. *Rech v. Coe*, *Cowp.* 636, 639. *Farmer v. Davies*, 1 *T. R.* 108. *Yeates v. Hall*, *ibid.* 73. *Ellis v. Turner*, 8 *T. R.* 531. *Tolson v. Hallett*, *Amb.* 269, and *Stat.* 7 *G. 2. C.* 15, *et ut supra*.

Buxton
versus
SNEE,
Nov. 15, 1748.

of it, for repairs done, except in course of a voyage; liberty given to bring an action as to the personal liability of the part-owners who received the benefit. (1)

[85]

Lord Hardwicke's decision in *Doddington v. Hallett*, 1 *Ves.* 497, over-ruled; and now settled that part-owners in a ship are not to be considered as partners.

BURNET

VOL. I.

Page 156.

Posthumous brother of the half-blood, entitled under statute of distribution. (1) Appointment pursuant to a power, good; though executed by will of a feme covert.

BURNET *versus* MANN, November 16, 1748.

(Reg. Lib. 1748. A. fol. 634.)

NOTES AND OBSERVATIONS.

(1) *VIDE* Millar v. Turner, antea 63.

Wallis v. Hodson, cited p. 156, is in *Barnard*, 272 and 2 *Atk.* 115. *Lady Roscommon v. Major Fowke*, cited p. 157, i in 6 *Bro. P. C.* 158, octavo ed. *Vide* *ibid.* 167, note.



[86 |

Page 157.

ROACH *versus* GARVAN, Nov. 16, 1748.

(Reg. Lib. 1748, B. fol. 32.)

NOTES AND OBSERVATIONS.

S.C. 1 Dick. 88.

Guardian and ward.
Marriage of a Ward of Court to a foreigner out of the

THE Statute of Queen *Anne*, referred to by Lord *Hardwicke*, p. 158, is 7 *Anne*, c. 5. Explained by 4 *Geo. II.* c. 21.

The other Statutes alluded to by his lordship in the same page are the 1 *Ja. I.* c. 4, and 3 *Ja. I.* c. 5. These (*inter alia*) made it criminal for persons within the realm to contribute towards the maintenance of British subjects placed in foreign priories, abbeys, nunneries, &c. Notwithstanding the several toleration acts in favour of the Roman Catholics, and particularly the 31 *Geo. III.* c. 32, the clause above referred to seems even as yet to be unrepealed, except with regard to such Roman Catholics as take the oaths prescribed by those Statutes.

This should be noticed, since heavy penalties may

may be incurred, in the present state of things, very innocently.

ROACH
versus
GARVAN,

As to the conclusiveness of foreign sentences, Nov. 16, 1748. adverted to p. 159, vide 1 *Vern.* 21, and Mr. Raithby's note.

With regard to Lord *Hardwicke's* refusal to allow any money to the alleged husband, p. 159, and several other points in this case, see *De Manneville v. De Manneville*, 10 *Ves.* 52, 56, &c. &c. and the cases cited in it.

The guardianship of *daughters* is determined by their marriage, but it is *otherwise of sons*. See 1 *Ves.* 91. But nevertheless, and although a female Ward of Court may, after coming of age, make whatever settlement she please, it is still indispensable, in order to exclude the further cognizance of the Court, for her either to come into Court to shew her actual consent to the proceeding, or to have such consent taken by commission; "for she is not discharged from the protection of the Court, except by the act of the Court." Therefore it is, that until "such a consent is recorded, a Ward must always be considered as "encircled by the Court's protection."

Guardianship.

[87]

Protection of
the Court.
Its interference,
&c.

Per Lord *Eldon*, C. Lincoln's Inn Hall, March 12, 1802, upon a petition to explain an Order under which it had been referred to the Master, to see whether a settlement *made by a ward when adult* was proper, or not: Mr. Hall, as counsel, submitting, that such a reference was unnecessary. Author's MS note.

As to removing a testamentary guardian, see in *D. Beaufort v. Berty*, 1 *P. W.* 704, accord. *Foster v. Denny*, 2 *C. Ca.* 237, and 1 *Eq. Abr.* 260, would seem contra; and so likewise *Dillon v.*

Removal of a
testamentary
guardian.

Lady

ROACH
versus
GARVAN,
Nov. 16, 1748.

Lady Mount Cashell, Dom. Proc. 4 Bro. P. C. 306 (octavo edit.) and the note at the head of the preceding case, *ibid.* 302. It is clear, upon the principle stated in the report, that a testamentary guardian may be removed for misconduct; see 2 *Fonb. T. E.* 247; so if he becomes a lunatic, *Exparte Lady Ann Brydges*, *ibid.* 248. The Lord Chancellor has, upon application of an infant, and consent of his relations and guardians, appointed other persons to have the care of him till further order. *Spencer v. Earl of Chesterfield, Amb.* 146.

[88]
VOL. I.

Page 160.

Mortgage—redemption resisted, and mortgagee ordered to pay costs. (1)

BAKER versus WIND, November 19, 1748.

NOTES AND OBSERVATIONS.

(1) *S. P.* in *England v. Codrington*, 1 *Eden. Rep.* 69, and *Smith v. Smith*, Feb. 13, 1815, before Lord Eldon C. on motion, after the question of the mortgage had been decided in an issue; and the costs were *directed to be paid forthwith*, although it had been long and much pressed that they ought to be set off in the account of what was due on the mortgage. Edit. See also *Detillin v. Gale*, 7 *Ves.* 583, and *Shuttleworth v. Lowther*, there cited. *Smith v. Smith*, is reported in part, *Cooper Rep. Ch.* 141.

Page 161.

Bill for an account and share of prize money dismissed; the sum being certain, and the remedy at law against the prize agents.

OGLE versus HADDOCK, Nov. 22, 1748.

(*Reg. Lib.* 1748. B. fol. 13.)

ALLEN

ALLEN *versus* PAPWORTH, July 22, 1731.

(Reg. Lib. 1730. A. fol. 479.)

ALLEN *versus* PAPWORTH, Nov. 23, 1748.

(Reg. Lib. 1748. A. fol. 714.)

VOL. I.

Page 163.

NOTES AND OBSERVATIONS.

THE deficiency of statement in this case in Mr. Vesey senior's Reports, gave occasion for Sir John Mitford's remarks as to the Judgments in those Reports being much more correctly given than the statements of the facts in general, and also to the expression of the wish of the present Mr. Vesey, that he might be able to rectify the latter, by reference to the Registrar's Books. See the note to *Whistler v. Newman*, 4 Ves. p. 138.

(1) See also *Irwin v. Farrer*, 19 Ves. 86.

The incessant labours of Mr. Vesey have, however, precluded even his diligence from the execution of this desire, which the present Editor has to regret, in common with the Profession at large.

The case of *Allen v. Papworth* seemed not only to stimulate research, but to require somewhat of a general exposition to the Profession. The Editor has therefore traced it from its origin.

John Allen and Susanna, his wife (the parents of the present Plaintiff), in 1731 filed their Bill against Richard Papworth (the same Defendant that appears in the Report) stating, that the Plaintiff, John Allen, being seised in fee of several freehold hereditaments, mortgaged the same to L.

procured an assignment of a mortgage, allowed to tack the amount and costs.

* It appears from the subsequent bill of the son, that he was in being at the commencement of the proceeding in question, and it is not contradicted in R. L. The report in Vesey seems inaccurate as to that fact, Editor.

Bill in equity by husband and wife, who had a power of appointment for her separate use, submitting that the subject of it

[89]

should be applied in payment of his debts by mortgage and otherwise, for which a Decree passes, is tantamount to an actual appointment. (1)

The heir therefore, although in being at the time, * and not made a party to the original suit, was not permitted to unravel the accounts taken under that Decree; but only to surcharge and falsify.

Judgment creditor having

ALLEN
VERSUS
PAPWORTH,
Nov. 23, 1748.

[90]

who assigned them to *B.* who assigned them to one *Warboys*; and that the Plaintiff, being also entitled to some copyhold lands “in right of his wife,” he charged them as a further security, with the monies thus advanced, and other sums, which he alleged had, however, never been advanced, as agreed upon. It then stated, that the Defendant, having sued the Plaintiff to judgment on a small debt, and charged him in execution, had procured *Warboys* to give him all the title deeds, and, without the Plaintiff’s privity, to assign over to him the mortgage term, &c. &c. That the Plaintiff, having then lately been discharged by an Insolvent Act, the Clerk of the Peace had assigned all his estate to the Defendant in trust for all his, the Plaintiff’s creditors; after payment of whom, the overplus was to be paid to the Plaintiff. That the Defendant had received the rents, &c. &c.; wherefore the bill prayed for an account for a sale of the estate, and payment of the Plaintiff’s creditors; and for a redemption, upon payment of what was justly due to the Defendant and Plaintiff’s other creditors.

The Defendant, *Papworth*, after admitting the former mortgage, &c. stated, indentures of 17th and 18th January 1723, between Plaintiff, of the first part; *Warboys*, of second part; *George Priest* and *G. Hay*, of third part; whereby, in consideration of 270*l.* over and above 180*l.* due to *Warboys*, Plaintiff conveyed to *H.* and *P.* several freehold and copyhold premises to the use of *W.*; and after the determination thereof to *P.* and *H.* “on the trusts therein mentioned; and that Plaintiff thereby covenanted to levy a fine of said premises, which was levied accordingly; and on payment

payment of 461*l.* 5*s.* in the release mentioned, the said term was to cease : and that for better securing said 180*l.* and 270*l.* Plaintiff, on 24th January 1723, surrendered some copyhold lands to the use of *W.* his heirs and assigns, &c. according to the release. That said 270*l.* was really then paid, but that *W.* afterwards received part of it, whereby his demand was reduced to 350*l.* He then stated his recovering judgment for 28*l.* but that Plaintiff was not charged in execution, Defendant being obliged to outlaw him. Finding that would be ineffectual, because *W.* had recovered judgment in ejectment of all said mortgaged premises, and had been admitted to the copyhold premises, he, Defendant, procured an assignment from *W.* by deed, 9th March 1724, in consideration of 382*l.* 8*s.* &c. &c. He admitted the assignment from the clerk of the peace, that 490*l.* was then due to Defendant for principal, interest, and costs on the mortgage ; and that the costs of the outlawry and proceedings therein amounted to 61*l.* 9*s.* 8*d.* ; and that Plaintiff was, besides, indebted to him in various other sums for costs and charges to which he had been subjected. He then craved an allowance of all such sums, and submitted to reconvey on payment of them all.

ALLEN
versus
PAPWORTH,
Nov. 23, 1748.

[91]

His Honour directed an account of what was due to Defendant on his mortgage, and to tax his costs both at law and in equity, and to take an account of what was due to him on his judgment. Notice was directed to be inserted in the Gazette for all such to come in as were the Plaintiff's creditors before the said Insolvent Act. An account was then directed as to the Defendant's receipts, &c. ; then a sale of the mortgaged premises, the proceeds

ALLEN
versus
PAPWORTH,
Nov. 23, 1748.

proceeds of which were to be applied, first in payment of all that should be found due to the Defendant on the above account, and then of the above mentioned other creditors. If there were any *surplus*, it was to be paid to the Plaintiff; if there should be a deficiency, the said creditors were to abate in proportion. *R. L.*

[92]

It appears from *Reg. Lib.* 1748. *A. fol.* 714—That the Plaintiff *Susanna* died, pending the accounts before the Master, directed in the above suit; leaving *Felix Allen*, her eldest son by the Plaintiff *John*, and her heir at law, &c. *Felix Allen* filed his original bill against *Papworth* the mortgagee and his father, stating that the estates were settled by the father of his mother *Susanna*, by way of remainder (after his own life estate) to his father and mother, and the survivor of them, for life, with remainder to the heirs of the mother by the Defendant his father, with remainder to her right heirs. That his grandfather having died, the Plaintiff's father borrowed 100*l.* on mortgage of the premises so settled. That his father purchased some copyhold premises of his own, and mortgaged them, with an assignment of the other premises on further advances. That the father and mother *levied a fine*, and suffered a recovery, the uses of which were declared by a deed in 1723, for the purpose first, of securing the mortgage monies, and afterwards for the separate use of the mother for life, and then to the use of her heirs and assigns. That the mortgagee having assigned the several premises to the Defendant *Papworth*, in 1724, he took and continued in possession, &c. That the father and mother, in 1731, brought their bill against *Papworth*,
for

for an account of the rents, &c. and for a redemption. In which suit, in the same year, the Master of the Rolls decreed accordingly; and that the premises should be reassigned *to the Plaintiff's father*. That pending the account before the Master, the Plaintiff's mother died; and the bill alleged, that, notwithstanding, all the premises, by virtue of the settlement, descended to the Plaintiff upon his mother's death, *and he came of age so far back as 1743**. Yet as by the default of his father, and his agents, he was made no party to that suit, the Defendant therein being to assign the premises *to the Plaintiff's father only*, he the Plaintiff had been kept in the dark, and ignorant of his title to, and interest in, the premises until then lately, &c. &c. and contended that the Defendant *Papworth* was indebted to the Plaintiff on account of his receipts in 500*l.* and upwards, &c. The bill prayed an account—payment of the balance—delivery of possession, &c. *Felix Allen*, the last mentioned Plaintiff, having died, the suit was revived by his sister, and heir at law. The Defendant *Papworth* (*inter alia*) stated, that the parties not only assigned such lands as they had before mortgaged, but likewise *all other* the lands and tenements, both freehold and copyhold, for a term of 500 years, subject to redemption; *and then to other uses*. He denied that any *recovery* was suffered, or *such uses declared as were stated by the bill*, but admitted that a *fine* was levied, the uses of which were declared by the Decree of

ALLEN
versus
PAPWORTH,
Nov. 23, 1748.

[93]

* He must therefore have been in *esse* at the commencement of the proceedings, contrary to the statement in Mr. Vesey's report, since the answers in *Reg. Lib.* do not contradict this assertion. EDIT.

ALLEN
versus
PAPWORTH,
Nov. 23, 1748.

[94]

1723, to be to the use of the mortgagee for the residue of the term of 500 years, by way of mortgage, and afterwards to the use of *Priest* and *H.* their heirs and assigns, for the lives of the father and mother, and the longer liver of them, *on the trusts after mentioned*, and after their death to the heirs of the body of the wife by her said husband; and for default of issue, to her in fee. That the estate, so limited, in use to *P.* and *H.* was so vested on special trust that they should during the life of the wife (subject to the mortgage) *employ the rents of the premises for the sole and separate use of the wife and her children for her and their maintenance and education, and pay the same to her, or whom she should appoint, exclusive of her husband, and so as he should have no power in respect thereof; and after her decease, in trust, to stand seised or to convey, &c. as the wife, in the lifetime of her husband, notwithstanding her coverture, as well without, as with his consent, and after his decease by any writing, or by her will should appoint, and for want thereof to her heirs and assigns.*

The Defendant, after stating the facts, as to his judgment, and his having procured an assignment from *Warboys*, submitted, that the amount of his judgment and costs should be a charge on the premises.

He also stated, that there was no other surrender of the copyhold than the one he had before mentioned, nor to any other uses than the above; and insisted that the Plaintiff's father had a right to charge the premises, or some part thereof, with a further sum than the said 350*l.* which he hoped to be able to prove. He also insisted, that the Master's report under the former Decree, whereby
625*l.*

625*l.* 12*s.* 11*d.* was found due to him should not be unravelled, and that he ought not to be obliged to account with the Plaintiff *except from the foot of that account*. The Court referred it to the same Master, to carry on the accounts directed by the former Decree *on the foot of that Decree, and the several proceedings had thereon; with liberty for the Plaintiff to surcharge or falsify the said accounts*; and declared, that the rents and profits of the estate in question that had accrued during the lifetime of the Defendant *J. A.*'s late wife, and which should accrue during his life, were by virtue of the said Decree, and former proceedings, subject to all the debts of the said *J. A.* and decreed accordingly; and that the only other creditor who had proved his debt against *J. A.* under the former Decree, should be paid the amount of his debt as reported. If there should be any balance due to the Defendant *Papworth*, he was to be redeemed by the payment of the Plaintiff, and to convey to her and her heirs, &c. In case that Defendant should appear to have been overpaid, then so much of the mortgaged premises as should appear to belong to the Plaintiff, by virtue of the settlement of 1723, should be conveyed to her, &c. and the residue thereof to the Defendant *J. A.* &c. And the Court reserved the consideration of any directions touching any contribution to be made by the Defendant *J. A.* to the Plaintiff, and also of any right of redemption which the Defendant *J. A.* might have as to any part of the mortgaged premises that belonged to him, and was not comprised in the settlement of 1723, &c. &c. *Reg. Lib.*

ALLEN
versus
PAPWORTH,
Nov. 23, 1748.

[95]

VOL. I.
 Page 164.

WORTLEY *versus* PITT, Nov. 23, 1748.
 (Reg. Lib. 1748. B. fol. 12.)

[96]
 Page 165.

STONES *versus* HEURTLEY, Nov. 25, 1748.
 (Reg. Lib. 1748. B. fol. 554.)

NOTES AND OBSERVATIONS.

Devise to trustees by sale or mortgage to pay debts ; the remainder to go and be equally divided among three children, and the survivor of them, and their heirs for ever : a tenancy in common. (1)

(1) SEE *Hawes v. Hawes*, and *Mendes v. Mendes*, 1 *Ves.* 13 and 89, *et ante* 15 and 65, and 7 *Ves.* 286.

The last words of the devise were "given them" and settled upon them by his will and other-
 "wise howsoever."

Stringer v. Phillips, cited page 165, is in 1 *Eq. Ca. Ab.* 292. *Blisset v. Cramwell*, cited p. 167, is in 3 *Lev.* 373, and *Salk.* 226.

Page 168,
 and 169.

CARTER *versus* CARTER,
 Nov. 26, and Dec. 5, 1748.
 (Reg. Lib. 1748. A. fol. 610.)

JOHNSON *versus* ARNOLD, Dec. 5, 1748.

(Reg. Lib. 1748. A. fol. 160.)

VOL. I.

Page 169.

NOTES AND OBSERVATIONS.

H. S. by his will "reciting, that chief part of his estate was vested in partnership with his executor, directed his said executor to pay to the Plaintiff *George Johnson* 4000*l.* by instalments of 500*l.* *per annum*, which instalments were to be laid out," &c.

Money considered as land to effectuate the general intentions of testator.

The former bill, mentioned at page 170, as brought by the present Plaintiff, was filed by him and an infant daughter (who had since died) for an execution of the Trusts. *R. L.*

[97]

In the present suit it was declared, "That it appeared to the Court that it was the intention of the testator in his will, that the sum of 4000*l.* should finally be laid out in the purchase of lands, in order to effectuate the several limitations in his will, but not in the lifetime of the Plaintiff *George Johnson*, without his consent, and after the decease of the Plaintiff, *George Johnson*, the Defendant *W. A. &c. &c.* would be entitled to the several sums of money bequeathed to them," &c. &c. The Court did not give any costs to any of the parties. *R. L.*

VOL. I. **BRYANT versus SPEKE, Dec. 6, 1748.**
 Page 171. (Reg. Lib. 1748. A. fol. 156, entered *Bryant v. Gould.*)

It was the rule in Lord Hardwicke's time to give interest at 5 per cent. on legacies out of personal

estate, and 4 per cent. out of real. (1)

It has now long since been altered,

and the general rule is that they shall all carry interest at 4 per cent. from the end of a year after the testator's death. (2) The case of maintenance is an exception. (3)

NOTES AND OBSERVATIONS.

(1) SEE 1 *Ves.* 277, and 2 *Ves.* 239.

(2) Vide *Sitwell v. Bernard*, 6 *Ves.* 520. 543, 544, where Lord Eldon C. disapproves the Court's going further on particular circumstances (except as to maintenance).

(3) *Sitwell v. Bernard*, 6 *Ves.* 520.

[98] **D. of LEEDS versus POWELL, Dec. 7, 1748.**
 Page 171. (Reg. Lib. 1748. A. fol. 110.)

NOTES AND OBSERVATIONS.

Bill in equity lies for payment of an entire rent (1) out of a manor, where there are no demesne lands on which to distrain. (2)

(1) SEE *Bouverie v. Prentice*, 1 *Brown* 200. Mr. *Bel's* edition, with the notes.

(2) The bill stated the grant "as of a fee-farm rent of 36*l.* 16*s.* 8*d.* issuing out of, or reserved for, the lordship of L. N. in the county of Cardigan, alone, or together with other manors, lordships, lands, tenements, or hereditaments, and the reversion, &c. thereof, and all the right and title of his said Majesty, his heirs and successors, to the same, to hold to, and to the use of the said Earl, and his heirs for ever."

The

The bill, after alleging that from the time of the grant the said fee-farm rent was duly paid at Michaelmas yearly, as it became due, by the owners, and proprietors of the manor, &c. and that the said Earl having died long since, his estate and interest in the said fee-farm rent vested in the Plaintiff, who was seised thereof in fee, and that it had been so paid (as aforesaid) to his Guardian for his use ; stated the Defendant to be seised in fee, as proprietor of the manor, and that he ought to have paid the said fee-farm rent to the Plaintiff as it became due; but that there became due to the Plaintiff, at Michaelmas, 1744, 110*l.* 10*s.* 11½*d.* for three years arrears, which the Defendant refused to pay, *alleging*, that the same was *not one entire rent, but consisted of several small rents*, issuing out of several freehold lands within the manor, and payable by the tenants of the said lands, and that he the Defendant held only one tenement within the manor, for which a small rent was due, &c. whereas the Plaintiff *charged* that the said rent *was one entire rent*, issuing, and used to be paid by the proprietors of the manor for the time being, &c. and that the Plaintiff was totally unconcerned in any disputes between the Defendant and the tenants; and neither did the payment of the Plaintiff's said entire rent any way depend on the payment or non-payment of the rents of the particular tenants; and the Plaintiff charged that he was advised, that he had no authority to make any distress upon any of the lands, &c. within the manor, save only such as were in the actual possession of the Defendant, and that, being only one tenement upon which no distress could be found to answer the arrears due to

D. of LEEDS
versus
POWELL,
Dec. 7, 1748.



[99]

D. of LEEDS
 versus
 POWELL,
 Dec. 7, 1748.

to the Plaintiff, he could not recover the said rent and arrears thereof in the usual method at common law, and could not charge or affect the manor, and the rents, services, and other profits thereof, without the aid of the Court. The bill prayed that the Defendant might account with the Plaintiff for the said sum of 110*l.* 10*s.* 11*d.* rent due at Michaelmas 1744, and all arrears since, and which should become due to the Plaintiff; and that the Defendant might be decreed to pay the said rent as the same should grow due to the Plaintiff, and that the said manor, or lordship, and the rents, services, and other profits thereof, might be subjected to the payment thereof, or that the same might be sequestered by the Court for the payment of the said rent and arrears.

[100]

The Defendant insisted (*inter alia*) upon the above grounds, and upon an usage in levying and getting in the said rent, of requiring the same from the several occupiers, &c. and of distraining only on the lands out of which the rent issued, and for so much only on any one tenement as the same was in arrear for the rent reserved thereon. The Defendant stated, he believed it had been usual for the bailiff or steward of the manor for the time being, to collect the several quit rents thereof, and to pay the same from time to time to the agent or receiver of the Plaintiff; and if the tenants, liable to pay their share of the said rents, refused or neglected so to do, the Defendant insisted such bailiff or steward informed such agent or receiver for the Plaintiff thereof, who thereupon granted a warrant to such bailiff, &c. to levy such arrears or rents unpaid from such several persons with respect to their several estates

or

or possessions, and that thereupon such bailiff distrained accordingly.

D. of LEEDS
versus
POWELL,
Dec. 7, 1748.

The Court declared, "that the Plaintiff was entitled to the said rent of 36*l.* 16*s.* 8½*d.* as one entire fee-farm rent, issuing and payable out of the said manor of L. N. in the county of Cardigan; and that the several ancient quit rents and chief rents payable by the tenants of the said manor, passed by a grant of his late Majesty King *Charles* the First (stated in the answer) to *E. D. &c.* And that the said Defendant, as claiming under them, was entitled to the said ancient quit rents, and chief rents, and to distrain for the same on the tenants of the lands liable thereto." The Master was to take an account of the arrears due from the Defendant to the Plaintiff, in which he was to make an allowance for the land-tax, pursuant to the several acts of Parliament relating thereto, &c. And it was ordered that the Defendant should pay unto the Plaintiff what should be found due on the balance of the said account; and that he should, so long as he should be seised of the said manor, continue to make the growing payments of the said fee-farm rent of, &c. to the Plaintiff, annually; and that he should pay the Plaintiff the costs of the suit. *Reg. Lib.*

[101]

The case cited p. 173, is *Cook v. Smee*, 2 Bro. P. C. 184, octavo edit.

VOL. I.

Page 173.

LLOYD *versus* BALDWIN, Dec. 9, 1748.(Reg. Lib. 1748. A. fol. 85, entered "*Lloyd v. Garth.*")

NOTES AND OBSERVATIONS.

Purchaser or mortgagee under a Decree for sale or mortgage and payment of creditors, answerable for the application of the money, if not paid into Court.

[102]

THE estate was mortgaged to *Edward Turnour*, the representative of whose devisee in trust, together with his infant son (the *cestui que* trust), were now before the Court as Defendants. The former, after having urged that the estate was not liable; or, if it was, that *E. T.*'s personal estate was more than sufficient to answer the Plaintiff's demands, insisted upon the presumption of payment of the Plaintiff's demands out of the money paid by *Turnour*; and likewise insisted upon the statute of limitations. The Court, after directing the Master to carry on the account of subsequent interest upon the Plaintiff's demands, and to tax their costs of the suit, ordered, that upon payment by the Defendants, the representatives, &c. or by the Defendant the infant, of what should be found due to the Plaintiff for such principal, interest, and costs, at such time, &c. within six months, &c. the Plaintiffs should assign to the Defendants, or, &c. their several debts and incumbrances, &c. &c. but in default of such payment, then the estate in question, or a sufficient part thereof, should be sold, &c. and the money arising from such sale paid into Court; and reserved further directions. And the Decree was to be without prejudice to any remedy or relief the Defendants, the devisees and trustees of *E. T.* might be entitled to against the representatives of

of the personal estate, or against the Defendant *E. B.* the heir at law of *J. B.* (to whom the money had been paid,) to be reimbursed and indemnified in respect of what they should so pay, or of what should be raised out of the estate in question, for satisfaction of the Plaintiff's demands. *Reg. Lib.*

LLOYD
versus
BALDWIN,
Dec. 9, 1748.

CUNNINGHAM *versus* MOODY, Dec. 10, 1748.
(*Reg. Lib.* 1748. A. fol. 150.)

VOL. I.
Page 174.

NOTES AND OBSERVATIONS.

As to this case vide *per* Lord Loughborough C. 2 *Ves.* Jun. 707.

Edwards v. Lady Warwick, cited p. 175, is in 2 *P. W.* 171.

Gifford v. Barber, cited *ibid.* was before Lord Hardwicke C. See 4 *Vin. Ab.* 452-3.; which deserves attention. *Smith v. Parker*, cited by Mr. Ambler in *Twcedale v. Coventry*, 1 *Bro.* 246. seems of no authority, though Lord Thurlow was not warranted in discrediting it as the report of Mr. J. Blackstone. It is observable that *Gifford v. Barber* was not cited in it. See *per* Lord Thurlow, 1 *Bro.* 246. Mr. Serjeant Williams' note to *Jefferson v. Morton*, 2 *Saunders*, 8. *Doe v. Hutton*, 3 *Bos.* and *Pull.* 351, and 2 *Cruise Dig.* 472-3.

Lord Conway's case, cited *ibid.* is *Walpole v.* [103]
Lord Conway, *Barn. Ch. Rep.* 153. It is also stated *arguendo* 1 *Ves.* 259. *et per* Lord Chancellor, 261. Vide also 2 *Ves.* Jun. 707.

As to the point in page 176, where money was to be considered as land with reference to tenant in

CUNNINGHAM
OPISUS
MOODY,
Dec. 10, 1748.

Lord Eldon's
act.

in tail, see the alteration in the law made by statute 40 Geo. III. c. 56; called Lord *Eldon's* act; which prevents the necessity of an actual investment, where, if it had been made, the party might have suffered a recovery of the land. As to the mode of executing its provisions, see 5 *Ves.* note. *Ex parte Hodges*, 6 *Ves.* 576. *Ex parte Frith*, 8 *Ves.* 609.

VOL. I.

Page 177.

OGLE *versus* COOK, Dec. 10, 1748.

(Reg. Lib. 1748. B. fol. 22.)

NOTES AND OBSERVATIONS.

In a suit to establish a will in Equity, all the witnesses to it should be examined, or proof given of their deaths. (1)

(1) VIDE the notes on *Grayson v. Atkinson*, 2 *Ves.* 454, *postea* (383); and note, that although in a mere action at law on a will, the Courts there are content with the examination of any one of the witnesses; the case is different in the trial of an issue THERE; for all the witnesses must be examined under it, or proof given of their deaths. Vide *Bootle v. Blundell*, 1 *Coop. Ch. Rep.* 136, and 19 *Ves.* 494.

[104]
Page 178.
and 186.

WILLET *versus* SANDFORD, Dec. 12, 1748.
(Reg. Lib. 1748. B. fol. 529, entered "*Willet v. Wyndowe.*")

NOTES AND OBSERVATIONS.

Devise before
the Mortmain
act, (1) and a
codicil

(1) SEE 1 *Ves.* 36, and 225.

(2)

(2) The will and codicil were established, and the trusts thereof directed to be performed, "except as to this piece of land; as to which it was declared, that the devise in the said codicil for the benefit of the said charity was void," *R. L.*

Lord *Lincoln's* case, cited p. 178, is in 1 *Eq. Ca. Ab.* 411. *Onions v. Tyrer*, cited p. 179, is in 1 *P. W.* 343.

As to cases where an instrument, though incompetent to pass an interest, may amount to a revocation, as noticed at the bottom of p. 178. See the solemn Judgment of Lord *Eldon C.* in the *E. of Ilchester's* case, 7 *Ves.* 370, &c.

WILLET
versus
SANDFORD,
Dec. 12, 1748.
codicil after it,
not disturbing
the charitable
trust, but
devising to the
same use, and
adding two
more trustees,
is not rendered
void, although
the codicil
attempted to
unite another
piece of land in
the trust. (1)
Revocation.

WHARAM *versus* BROUGHTON.

NOTES AND OBSERVATIONS.

A BILL of Revivor was subsequently filed, agreeably to Lord *Hardwicke's* suggestion. An Order was made on the 1st of February 1749, that the Defendant *Broughton* should appear on the ensuing 1st of March, grounded on an affidavit, "that, upon enquiring at his usual place of abode, he could not be found, so as to be served, and that he absconded to avoid being served." *Reg. Lib.* 1748, *B. fol.* 98.

On the 11th of March ensuing, *Steele's* exceptions were over-ruled, and he was ordered to pay the several sums reported due from him, &c. to the Plaintiff, towards satisfaction of the duty and costs decreed to her testator. *R. Lib.* 1748. *B. fol.* 185.

Bill pro confesso.

VOL. I.
Page 186.

[105]

As

WHARAM
versus
BROUGHTON.

As to these Decrees, *pro confesso*, see *Geary v. Sheridan*, 8 *Ves.* 192, and *Landen v. Ready*, 1 *Sim.* and *Stuart*, 44: from whence it appears they are absolute in the first instance; no day being given to shew cause.

As to sale of goods under sequestration, &c. and its distinction being under a decree, and not prevailing in *mesne process.*
(2)

(2) Some confusion might arise from a dependence on the doctrine appearing in the Report of the principal case, p. 184. This distinction, however, must be ever adverted to. See Mr. *Bell's* note to *Hales v. Shafto*, 3 *Bro.* 72.; which cites Mr. *Dickens'* able exposition of the subject, 2 *Dick.* 622. 625. 626. *Hales v. Shafto*, 3 *Bro.* 72. *Knight v. Young*, 2 *Ves.* and *Beames*, 184, and *Cecil v. Smith*, 3 *Bro.* 362, with Mr. *Bell's* notes.

VOL. I.
Page 188.

HUGHES *versus* TRUSTEES OF MORDEN
COLLEGE, Dec. 20, 1748.

(*Reg. Lib.* 1748. *A. fol.* 78, entered "*Hughes v. Brand.*")

NOTES AND OBSERVATIONS.

Garden grounds used for trade as much protected by the Highway acts, &c. as private gardens. Plaintiff, therefore, quieted in possession by Injunction against the Commissioners.

THE Plaintiff was a gardener by trade, and had added the garden ground in question, consisting of 3 acres and a half, to 7 acres which he occupied as garden ground, adjoining to it.

The Defendants, the Commissioners, insisted "that the Plaintiff's ground was not within the exception of the acts of Parliament, which [they alleged] applied only to HOUSE-GARDENS, orchards, &c. or meadows, planted walks, or avenues to a house."

An injunction was awarded "to quiet the Plaintiff

"Plaintiff in such possession of the premises in
"question as he had at the time of filing his
"amended bill, and for three years before ; which
"was to continue until the hearing of the cause."
Reg. Lib.

HUGHES
versus
TRUSTEES OF
MORDEN
COLLEGE,
Dec. 20, 1748.

HAWKINS versus DAY, Dec. 21, 1748.

(*Reg. Lib.* 1748. A. fol. 115.)

NOTES AND OBSERVATIONS.

[106]

VOL. I.

Page 189.

NOTWITHSTANDING the first impression of the Court, as stated in the report, it appears that Lord *Hardwicke* at length "Declared, that he
"was of opinion it was reasonable, under the cir-
"cumstances of the lease, that upon the terms
"thereinafter mentioned, the petitioner, the De-
"fendants *J. Day*, and *M.* his wife, should have
"liberty to re-argue the exceptions formerly
"taken to the said Master's report, mentioned in
"the petition, and to take new exceptions to the
"said report relating to the matters complained
"of in the petition, to come on to be argued at
"the same time. But the Counsel for the Plain-
"tiffs desiring for the sake of dispatch to avoid
"such circuitry, and the delay and expence that
"would be occasioned thereby, his Lordship
"ordered ' that, upon the said Defendant *J. D.*'s
"giving his own recognizance within a fortnight
"from that time, in the penalty of 2000*l.* with
"condition to pay such sum of money, if any,
"as should be found due from him upon the
"balance of the account, directed by the Decree
"to such of the parties to whom the same should
"be

Confirmation
of Master's
report opened,
and the report
allowed to be
excepted to, or
reviewed, under
particular cir-
cumstances, (1)
although pre-
vious excep-
tions had been
disallowed after
argument.

HAWKINS
versus
DAY,
Dec. 21, 1748.

[107]

" be found due, together with interest for the
" same from that day, at the rate of 4 *per cent.*
" *per annum*, in such manner as the Court should
" direct, and paying to the Plaintiffs such costs
" as they had been put to by taking out the said
" Master's last Report, so far as the same related
" to the account of the personal estate, and the
" administration thereof, and the costs subsequent
" thereto, so far as the same related, &c. ; and the
" costs of that application to the Court, &c. within
" a week after the taxation, or settling thereof:
" that the confirmation of the said report should
" be so far opened as related to the said account
" of such personal estate, and the administration
" thereof ; and that it should be referred back to
" the Master, to review that part of the said re-
" port.' And it was further ordered, that the
" Master should speed his subsequent report, and
" that the parties should attend *de die in diem* for
" that purpose." *Reg. Lib.*

(1) See the several instances collected by Mr.
Swanston, in his very elaborate and useful note to
Turner v. Turner, 1 *Swanst. Rep.* 156.

VOL. I.
Page 189.

PARSONS *versus* LANOE, Jan. 28, 1748-9.

(*Reg. Lib.* 1748. B. fol. 471.)

S. C. Amb. 557.

NOTES AND OBSERVATIONS.

Will on a con-
tingency.
Devise in case
of testator dy-
ing before his
return from
Ireland.

(1). VIDE *Sinclair v. Howe*, 6 *Ves.* 607.
(2). Though Lord *Hardwicke*, at the bottom of
p. 191, refers to the existence of doubts as to
whether marriage and the birth of a child operated
as

as a revocation of a will, *it was considered to be law that it would*, in *Brown v. Thompson*, 1 *Eq. Ab.* 413; which rule was not contravened, although the decree there was reversed *under the particular circumstances*. See 1 *P. W.* 304, notes (4); et vide 1 *Ves.* and *B.* 397.

Notwithstanding the presumption seemed to apply equally strong to real estate as to personal, and especially when the observation of Lord K. Wright in *Brown v. Thompson* (on appeal 1 *P. W.* 304, 305) is attended to, viz. "that the Statute of "Frauds and Perjuries does not extend to implied "revocations;" it was never absolutely determined till the case of *Christopher v. Christopher*, in the Exchequer, July 6, 1771. See 4 *Burr.* 2171, 2182. *Dougl.* 35, when it was adjudged in the affirmative. See the various cases up to the year 1778, collected in *Brady v. Cubitt*, *Doug.* 31; and those subsequently in the E. of *Ilchester's* case, 7 *Ves.* 348, &c. and 1 *Vesey* and *Beames*, 397, &c.

It seems, therefore, to be now quite settled, as a general rule, that marriage, and the birth of a child, will *presumptively* revoke a disposition by will, and that the exceptions serve but to confirm it.

Vide Mr. Cox's note above referred to, 1 *P. W.* 304, note (4) last edit. &c. The E. of *Ilchester's* case, 7 *Ves.* 348. *Sheath v. York*, 1 *Ves.* and *B.* 390, 397, &c. Et per Lord *Eldon*, C. *ibid*, 465.

In the principal case the bill was dismissed without costs, the Plaintiff having declined the Court's proposal to try the validity of the will at law. *R. L.*

PARSONS
versus
LANOE,
Jan. 28, 1748-9.

Ireland.
Having returned, &c. the disposition ineffectual. (1)
Revocation by marriage, and birth of children. (2)

[108]

[109]
VOL. I.
Page 192.

LEGARD *versus* DALY, January 28, 1748-9.
(*Reg. Lib.* 1748. *B. fol.* 111, entered "*Le Gard*
v. Lord Mountjoy.")

No new trial
where there
must be the
same issues, and
no surprise, &c.
on the former

NOTES AND OBSERVATIONS.

Stapilton v. Stapilton, cited p. 194, is in 1
Atk. 2-5.
Infancy no ground for it in such a case. Verdict, founded on *evidence* discovered since the answer put in, and contrary to it, is not thereby prejudiced. Length of time, on an application for a new trial, a very great objection, both at law and in equity.

Page 195. JENNER *versus* WILKINS, Feb. 4, 1749.

(*Reg. Lib.* 1748. *A. fol.* 325.)

NOTES AND OBSERVATIONS.

Suspicious assignments for the family of insolvent debtor.

THE Master was directed to enquire whether the assignment made by the Sheriff to *J. T.* and the subsequent assignments made of the estate comprized in the assignment from the Sheriff, or any of them, were made *bond fide*, and for a valuable consideration, and what was the consideration of such assignments respectively; or whether the said assignments, or any of them, was or were made in trust, or for the benefit of the Defendant *R. B.* the insolvent debtor; or whether the said Defendant *R. B.* or any other person for his benefit, was in possession of the said estate; and the Master was to state the same, and all circumstances materially relating thereto, with his opinion thereupon, to the Court. *Reg. Lib.*

WYTH

WYTH *versus* BLACKMAN, Feb. 7, 1749.

(Reg. Lib. 1748. B. fol. 459.)

NOTES AND OBSERVATIONS.

THE case mentioned at p. 197, as in December 1742, was that of *Heneage v. Hunlocke*, 2 *Atk.* 456.

Clare v. Clare, cited from *Forr.* p. 198, is considered as overruled, and particularly by *Sabbarton v. Subbarton*, *Forr.* 245; and it is now settled, that a bequest, after a contingent limitation, *quasi* in tail, which does not take effect, is good. See *Phipps v. Lord Mulgrave*, 3 *Ves.* 613.

Gower v. Grosvenor, cited also p. 198, is in *Barn. Ch. Rep.* 54. *Roper v. Ratcliffe*, cited p. 199, is in 5 *Bro. P. C.* octavo edit. p. 360.

As to the doctrine stated p. 260, of the word "issue" by itself taking in all issue, *ad infinitum*, see *Horsepool v. Watson*, 3 *Ves.* 383; *Davenport v. Hanbury*, *ibid.* 257; *Royle v. Hamilton*, 4 *Ves.* 437; *Reeves v. Brymer*, *ibid.* 692; *Radcliffe v. Buckley*, 10 *Ves.* 195.

As to *Higgins v. Downes*, observed on by Lord *Hardwicke*, towards the end of his judgment, p. 202, see the case, with Mr. *Cox's* note, 1 *P. W.* 98.

In the principal case the bill was dismissed, so far alone as related to the furniture and household stuff. The Decree, in other respects, was (*inter alia*) for a sale of the estate, and division of the proceeds, agreeably to the former part of the judgment.

[110]

VOL. I.

Page 196.

S. C. Amb. 555.

Deed, construction of, grandchildren and great-grandchildren included by the term "issue"; and the word "children" following it, explained as meaning "issue" likewise.

Furniture, &c. at H. bequeathed for the use of those who should enjoy the estate, to be taken care of and delivered by executors, and to remain at H. as if in his own possession; vests in the first tenant for life.

[111]

VOL. I.

Page 202.

S.C.1 Dick. 129.

E. of DERBY *versus* D. of ATHOL,

February 8, 1749.

(Reg. Lib. 1748. B. fol. 236.)

NOTES AND OBSERVATIONS.

On a plea to the jurisdiction, it must be shewn what other Court has it. (1)

(1) SEE also 1 *Ves. jun.* 372, &c. The close analogy between pleas at Common Law and in Equity, is peculiarly observable in the principal Case. This analogy seems often to have been lost sight of; but since the first edition of this work, the whole subject has been treated most scientifically and perspicuously by Mr. *Beames*, in his "Elements of Pleas in Equity." As to the analogy in general, see the preface to Mr. *Beames's* work, &c. As to the point in the principal case, see *Beames El. Pl.* 89, 90, &c.

Attorney General v. Talbot, cited p. 204, is at 1 *Ves.* 78; vide also on the point, *Green v. Rutherford*, *ibid.* 462.

Demurrer, if good to relief, will extend to the discovery also. (2)

As to what Lord *Hardwicke* observes, p. 205, that a plea might be good as to either discovery, or relief, and bad as to the other, the rule seems now quite settled to be otherwise. It is now beyond a doubt, that although a Plaintiff, bringing his bill both for discovery and relief, may be entitled, in point of equity, to a discovery, a demurrer will nevertheless be allowed to the whole bill, if he is not entitled to the relief; for he ought to shape his bill according to the justice of his case; and if his bill had been merely for a discovery, he would have paid the costs of it forthwith, after it was given; *Price v. James*, 2 *Bro.*

319. *Collis v. Swayne*, 4 Bro. 480; et vide 3 Ves. 347; 6 Ves. 63, 686; 8 Ves. 2. *Sutton v. E. Scarborough*, 9 Ves. 71, 75. *Baker v. Mellish*, 10 Ves. 544. The case of *Fry v. Penn*, therefore, 2 Bro. 280, previously to these decisions, is not law.

E. of DERBY
versus
D. of ATHOL,
Feb. 8, 1749.

This rule, however, does not preclude a Defendant from answering to the discovery, though he demur to the relief. *Hodgkin v. Longden*, 8 Ves. 2.

(2) Lord Hardwicke thus expresses himself at the end of the principal case: "the question then, comes to this; whether ever the court divided a plea to the jurisdiction? Of late indeed, upon a Bill for several matters of discovery and relief, if there be a Plea to the whole Bill, which is a proper bar to part, the Court divides it, and lets it stand good as to part; although upon demurrer the Court over-rules it wholly: but no instance, that where a plea covered too much, the Court ever divided it." Upon this subject see further per Lord Hardwicke, in *Bp. Sodor & Man v. Lord Derby*, 2 Ves. 357, and Mr. Beames *El. Pl. in Eq.* 44, 45: from which it appears the general doctrine as to Pleas being sometimes allowed as to part of a Bill, is inapplicable to a Plea against the jurisdiction. Upon these subjects see further, Mr. Sanders's note to 2 Atk. 44. 284. 389.

As to the allowance of a plea to part of a bill. (3)
A demurrer always either allowed, or overruled.

(3) Vide etiam *Gregor v. Molesworth*, 2 Ves. 110. and *Richards v. Jackson*, 18 Ves. 472. It is remarkable that the peculiar circumstances of a Case once led Lord King to over-rule a demurrer to part, and to allow it as to other part, which decision was affirmed by the House of Lords. *Ratcliffe v. Fursman*, 2 Bro. P. C. 514. octavo ed.

E. of DERBY
versus
D. of ATHOL,
Feb. 8, 1749.

And it is no less singular that Lord *Hardwicke* himself, being also struck by the equity of the Case, should have approved of the decision also, and have overlooked the point of practice thus violated. See in *Stanhope v. Roberts*, 2 *Atk.* 214. Lord *Eldon*, C. in a similar case, adverting to that before Lord *King*, and approving of the principle, seems to have overruled the Demurrer *in toto*. See *Richards v. Jackson*, 18 *Ves.* 472. Upon which note that there seems to be some defect in the Report at page 474, both in the margin and in the text.

[112]
VOL. I.

Page 205.

S.C.1 Dick.131.

Inrolment of Decree set aside under circumstances. (1) Not, however, if made upon the merits. (2)

KEMP versus SQUIRE, February 10, 1749.

(Reg. Lib. 1748. A.fol. 193.)

NOTES AND OBSERVATIONS.

- (1) VIDE also 1 *Ves.* 326, which is S. C. with 409 *ibid.* and *Pickett v. Loggan*, 5 *Ves.* 702.
(2) Vide *Charman v. Charman*, 16 *Ves.* 114. *Robson v. Cranwell*, cited p. 205, is in 1 *Dick.* 61. *Benson v. Vernon*, cited p. 206, is in 3 *Bro. P. C.* 626, octavo ed.

Page 207.

MEDLICOT versus BOWES, Feb. 22, 1749.

(Reg. Lib. 1748. B.fol. 209.)

NOTES AND OBSERVATIONS.

Testator "desires" J. "to leave" D. 500l.

at

- (1) VIDE S. P. *Forbes v. Ball*, 3 *Meriv.* 437.
(2) See 2 *Ves. jun.* 533, 529.

The

The bill seems to have been skilfully framed, precisely upon the principle of the determination; namely, that *the gift was from the original testator*. It stated, that D. B. "thereby gave to *D. a legacy*, in the words, or to the effect following," &c. The Court held the same in *Forbes v. Ball*, 3 Meriv. 437, &c. although the second Testatrix had not in terms referred to her power. See the other Cases cited *ibid.* 439, &c.

The answer, though, acknowledging *some* items to be *unliquidated*, affirmed an account to have been stated *and a balance admitted by D.* &c. &c.

The Defendant was ordered to pay the costs of the suit. *R. L.*

No set-off therefore allowed on a demand of the estate of J. on that of D. *being in auter droit.*

MEDLICOT
versus
BOWES,
Feb. 22, 1749.

at her death, (1)
out of the money bequeathed her; held to amount to a legacy from the original testator; and not to lapse by D.'s death in J.'s life time, he having survived the testator. (2)

[113]

EMPEROR versus ROLFE, Feb. 24, 1749.

(Reg. Lib. 1748. A. fol. 693.)

VOL. I.

Page 208.

SEE *Willis v. Willis*, 3 Ves. 51. 54. *Hope v. Lord Clifden*, 6 Ves. 499. *Powiss v. Burdett*, 9 Ves. 428. *King v. Hake*, *ibid.* 438. *Schenck v. Leigh*, *ibid.* 300.

payable at twenty-one, or marriage, &c. one daughter having, after twenty-one and marriage, died in life of mother, her portion shall go to representatives, and not to her sister.

Portions in settlement by a term after mother's death for defendants to grow due and

638. *Gilpin v. Lady Southampton*, 18 *Ves.* 469; and *Perry v. Phelps*, 10 *Ves.* 34, 39; from which last it appears, that a mere Decree for an account of any single Plaintiff's demand, and payment of the result, is not sufficient to prevent an executor paying a judgment: for which purpose there should be a report and a final Decree.

MARTIN
versus
MARTIN.

In the case of a suit by Creditors, or where they can come in, the Court will restrain after a Decree merely to account: but it requires the oath of the Executor as to the amount of the funds. *Gilpin v. Lady Southampton*, 18 *Ves.* 469. See further in *Jackson v. Leaf*, 1 *Jacob & Walk.* 281, 282, and Mr. Bell's note to *Brooks v. Reynolds*, 1 *Brown*, 183.



ITHELL versus BEANE, February 28, 1749.

(Reg. Lib. 1748. A. fol. 708.)

VOL. I.

Page 215

S.C.1 Dick.132.

NOTES AND OBSERVATIONS.

THE testator devised "all the residue of his real and personal estate to the son, to hold to him, his heirs, executors, &c. for ever, and appointed him sole executor." R. L.

Devise of all testator's "real" and personal estate (1) "subject to debts," affects copyhold lands unsundered, for the benefit of the creditors, there

(1) Vide *Rose v. Bartlett*, Cro. Car. 292, and *Watkins v. Lea*, 6 *Ves.* 633, and the cases therein referred to; et vide *Goodwyn v. Goodwyn*, 1 *Ves.* being no freehold lands. If there had been, it would have been otherwise.

No preference allowed to a creditor who became a mortgagee under the devise in trust.

In marriage settlements, &c. on good or valuable consideration, as between the immediate "parties," such consideration will run through all the limitations for the benefit of the remotest persons; even of those in respect of whom the deeds would, otherwise, have been voluntary. (2)

ITHELL
versus
BEANE,
Feb. 28, 1749.

226, *et postea*. (117). But it was held in *Sutton v. Chetwynd*, by Sir W. Grant, M. R., that a covenant in marriage articles in favour of a stranger was merely voluntary, 3 *Meriv.* 249. And even in the case of an actual settlement, the Vice Chancellor held that limitations in favour of Brothers of the Settlor, were voluntary, and not good against purchasers for a valuable consideration. *Johnson v. Legard*, 3 *Mad. Rep.* 283. Query however, as to this?

(2) Vide *Stephens v. Trueman*, 1 *Ves.* 73, 74, *et antea*. (53)

[115]
VOL. I.

Page 217.

JACKSON *versus* JACKSON, March 1, 1749.

(Reg. Lib. 1748. A. fol. 402.)

NOTES AND OBSERVATIONS.

Construction of will; "and" construed "or." Vested legacy. Bequest of 400*l.* to R. to be paid in a year; and of a further sum of 100*l.* at the death of his mother; the latter held also a vested legacy.

THE bill was filed by the only son of R. and insisted, that the latter clause, "*but if my son R. should die in the life of my wife, without leaving issue male,*" amounted, under the circumstances, to a devise to the Plaintiff by implication. It is to be observed, that *William*, by his answer, *disclaimed any title to the premises*. R. L.

ATTORNEY

ATTORNEY GENERAL *versus* DAY,
March 3, 1748-9.

(Reg. Lib. 1748. A. fol. 276.)

VOL. I.
Page 218.

NOTES AND OBSERVATIONS.

THE case of *James v. Weymouth*, cited p. 219, is in *Ambler*, 220. See page 221 as to purchasers in the Master's office, where Lord *Hardwicke* is express as to the confirmation of the report. Till then, such contracts are incomplete; so that a loss by fire before confirmation, will fall upon the vendor, and the bidder be released. *Ex parte Minor*, 11 *Vesey*, 559.

The Court refused to effectuate an order, confirming the Master's report for laying out money in land for a charity, where the nature of a devise, on which it was founded, made

The bill was dismissed without costs. *R. L.* an opening to evade the statute of mortmain. In contracts, if a tenant in tail persists in refusing to execute, and dies, the Court will not decree the succeeding tenant in tail to perform it; for such a one takes *paramount, per formam doni*. Though specific performance might have been decreed against original parties holding as tenants in common, yet, where an alteration prevented a Decree as to one moiety, the Court would not direct a performance as to the other; the contract being entire, and an execution of half of it inadequate to the prime object.

ATTORNEY GENERAL *versus* ANDREWS,
March 9, 1748-9.

(Reg. Lib. 1748. A. fol. 663.)

[116]
Page 225.

NOTES AND OBSERVATIONS.

(1) THE will had no subscribing witness to it. *R. L.*

As to this point, see 2 *Ves. jun.* 232.

The best report of *Tuffnell v. Page* is in *Bar-
nardiston's Ch. Rep.* 9; although in most cases, that

Reporter

Devise to a charity before the stat. of Mortmain, of copyholds *unsurrendered*, held good. Copyholds pass by

ATTORNEY
GENERAL
VERSUS

ANDREWS,
Mar. 9, 1748-9.

by a will with-
out any witness.
As to where the
Courts have fa-
voured valid be-
quests and do-
nations for cha-
ritable pur-
poses.

Reporter is very inferior, and often inaccurate. It is also reported, 2 *Atk.* 37.

With regard to Lord *Hardwicke's* observations, page 226, as to dispensing with a recovery on entailed lands given to a charity before the Statute of Mortmain, see *Attorney General v. Rye and Warwick*, 2 *Vern.* 453, and some cases cited in it.

As to different cases, wherein valid charitable dispositions are favoured, see 1 *Gwillim's Bac. Ab.* 528, *et sequent.*

In the principal case, the Court declared, that the testator's will ought to be established as to all the copyhold lands and estate, whether surrendered or not, to the use of the will, &c. &c.; and that the relators ought to be admitted in the respective Courts of the manors whereof the said copyhold lands were parcel, according to the devise of the testator's will, as trustees of the charity therein-mentioned, on payment of the several fines, &c. &c.

[117]

VOL. I.

Page 226.

GOODWYN *versus* GOODWYN,
March 11, 1748-9.

(*Reg. Lib.* 1748. *A. fol.* 673.)

NOTES AND OBSERVATIONS.

Devise of "all
messuages, lands,
&c." will pass
copyholds,
where the intro-
ductory words
shew testator's
intent to dis-
pose

(1) SEE *Ithell v. Beane*, 1 *Ves.* 215, *et antea* (114) and the note there. The word "estate" naturally signifies the interest rather than the subject. See *Bailis v. Gale*, 2 *Ves.* 48, and *post* 268. Likewise in *Barry v. Edgworth*, 2 *P. W.* 524, and many of the cases collected in Mr. *Cox's* edit.

edit. p. 525; also *Pettiward v. Prescott*, 7 *Ves.* 541, &c. with *Roe dem. Child v. Wright*, 7 *East.* (259).

(2) *Nicholls v. Butcher*, 18 *Ves.* 193, 195.

Ibbetson v. Beckwith, cited p. 227, is in *Forr.* 157. *Tuffnell v. Page*, cited 228, is well reported, *Barn. Ch.* 9.

(3) See per Sir *W. Grant*, M. R. 2 *Meriv.* 382.

The observation towards the end of the report, that the word plural "*estates*," in common parlance, means "*a description of the lands*," has not always been acceded to. See *Fletcher v. Smiton*, 2 *T. R.* 656:

In the principal case it was (*inter alia*) declared, "that, after the death of *Thomas, Elizabeth* was entitled to the whole rents and profits "of the freehold lands of the said *Henry Framington*, lying in Tring and Sedgford, in the county "of Norfolk; and also entitled, in her own right, "to one-third part of the rents and profits of the "copyhold lands in Sedgford; and also to one- "third part of the said copyhold lands, under the "will of the said *Thomas* (the same belonging to "him by virtue of the will of his father, Sir *Peter Seaman*, his sister *Joan* having accepted the le- "gacy of 4000*l.* given unto her by that will; and "that the said *Elizabeth* was also entitled to one- "third part of the profits of the Manor of Tring, "in her own right. And as to the remaining "third part of the rents and profits of the said "copyhold lands, it appearing that the Defendant "*Elizabeth* was entitled to one moiety of such "rents and profits in her own right; but a ques- "tion arising in the cause, whether the remaining "moiety of such third part, that is to say, one- "sixth part of the whole copyhold lands passed "by

Goodwyn
Goodwyn,
Mar. 11, 1748-9.

pose of all his estate." (1) Devise of all testator's "*real property*," will pass his whole interest. (2) After-born-children included in a devise to "A.'s children." Satisfaction. (3) What passes by the word "*es- tates, &c.*" either alone, or with the addition of other words. (1)

GOODWYN
versus
GOODWYN,
Mar. 11, 1748-9.

" by the will of the said *Thomas*, he not having
" surrendered the same to the use of his will;" it
was ordered, that one of such moieties should be
appropriated or paid as the share of *Elizabeth*;
" and as to the other moiety of the last-mentioned
" third part of the said rents and profits, that is to
" say, one-sixth part of the whole rents and profits
" of the said copyhold lands, it was further ordered,
" that the said Master should enquire, whether
" *Joan Seaman*, afterwards Dame *Joan Nelthorpe*,
" or Sir *Henry Nelthorpe*, in her right, did, in her
" life-time, submit to the will of the said *Thomas*
" *Seaman*, or accept any benefit thereby," &c.

The Court reserving further directions as to the
payment thereof. *Reg. Lib.*

[119]

VOL. I.

Page 229.

TAYLOR versus PHILIPS, April 13, 1749.

(*Reg. Lib.* 1748. *B. fol.* 501.)

NOTES AND OBSERVATIONS.

As to whether
a surrender of
copyholds by a
feme covert
alone is good,
her husband
having been
present at the
time.

It is to be observed, that the will was made with
the actual privity and consent of the husband.

It ought to be noticed, that there is a defect in
the argument urged in favour of the devise, page
229; where, abandoning the *immediate* effect of
the surrender, it is referred to *take effect after the*
wife's death. It was adjudged upon several pre-
cedents in *Sympson v. Sothern*, *Cro. Jac.* 376,
that, without an express custom, a copyholder in
fee cannot surrender "*habendum after his death*,"
any more than a tenant in fee can convey *habend'*
after his death. *Bulstr.* 272. 273, *S. C.* *Rolle*
Rep.

Rep. 109, 137, 253, S. C. *Gobd.* 264, S. C. See 2 *Roll.* 791, 792. *Vide Rol. Ab.* 828. A copyholder, however, may do so by a particular custom: since *even a freehold may, by custom, be surrendered without livery. Co. Litt.* 490. *Perryman's* case, *ibid.* note (6).

TAYLOR
VERSUS
PHILIPS,
April 13, 1749.

In the principal case, the Court ordered the bill to be retained for twelve months, with liberty in the mean time for the Plaintiff (the infant heir at law of the wife) to bring an ejectment; but if he should not proceed to trial of such ejectment within that time, then his bill, as to these copyhold lands, was to stand dismissed with costs; and if the Plaintiff should proceed, &c. then the Defendants were to admit the pedigree of the Plaintiff, and of *Jane*, late wife of the Defendant Philips [the testator], as the same was admitted by the answer of the Defendant, Sir *N. E.* [the devisee]. *Reg. Lib.*

[120]

It appears from the Registrar's book of the next year, that a petition was presented on behalf of the Plaintiff, the infant, stating the above matters, and that the Plaintiff had delivered ejectments accordingly, but that the Defendant, Sir *N. E.* being elderly and unmarried, and the Plaintiff being his heir at law, had proposed to surrender the premises to the use of himself for life, and after his death to the use of the infant and his heirs, on condition that the said surrender was to be void on the said infant's attaining 21, if he then, or his heirs, in case of his death, should not accept of the proposal, and should disagree to such surrender: and that the Plaintiff was advised it was for his benefit to accept of such proposal; and therefore praying a reference to the Master,

as

TAYLOR
versus
PHILLIPS,
April 13, 1749, as to whether it would be for his interest and benefit to accept of such proposal; whereupon, and upon the consent of the Defendants, it was referred to the Master "to examine into the proposal of the said Sir N. E. and consider whether the same was reasonable, and for the benefit of the said infant to have it carried into execution;" which the Master was to state, with his opinion thereupon, to the Court. *Reg. Lib.* 1749. *B. fol.* 191.

[121]

On the 17th of November following, upon the cause coming on upon the Master's report, the Court ordered it to be confirmed, and the proposal therein stated to be carried into execution, with the following variation: "That the surrender to be made by the said Sir N. E. be made to the uses therein-mentioned, on condition that J. T. the infant, do, when he shall attain his age of 21 years, confirm the estate for life, to be limited to Sir N. E. by the surrender to be made of the copyhold premises; and this order is to be without prejudice to the Plaintiff, the infant, after he shall attain his age of 21 years." *R. L.* Ibid. 606. See further as to this *postea*, 258.

A *feme covert*, seised of copyhold lands in tail, according to custom, may, being solely examined by the steward, surrender them to him, to his use; for it is nevertheless to the use of the lord, whose servant he is. *Erish v. Rives*, *Cro. Eliz.* 717.

Upon the point of the above principal case, see *Compton v. Collinson*, in *C. P.* 1 *H. Bl.* 342, where the Court determined, that a married woman living apart from her husband under articles of separation, by which (*inter alia*) he covenanted to join in all necessary conveyances, and in surrendering

rendering the copyholds as she should appoint, could surrender the copyholds *without the husband's joining, and without a special custom for the purpose*; for that *the wife* was tenant, and not the husband; and that the estate could be forfeited or surrendered only by *her* acts, not by his. The Court, indeed, added, "that the authority "which he acquires by his marital rights, to direct "and controul her acts, was, by his covenant, in "the present instance, annulled, or at least suspended." But the judgment was necessarily founded upon the doctrine above cited, *abstractedly from the covenant*; since that required him to join in all *necessary* conveyances and surrenders, whereas, from what appears before, *his joining* was held *unnecessary*. This case, therefore, has taken *the opinion* stated in *Stevens v. Tyrrell*, 2 Wils. 1. "that a custom for a *feme covert* to surrender without the assent of her "husband is bad."

TAYLOR
versus
PHILIPS,
April 13, 1749.

[122]

AYRES *versus* WILLIS, April 17, 1749. VOL. I.
(Reg. Lib. 1748, A. fol. 585, entered "Ayres v. Carte.") Page 230.

NOTES AND OBSERVATIONS.

(1) VIDE *Walker v. Walker*, 1 Ves. 54, 55, *et antea* (43) and the note there. Also *French v. Davies*, 2 Ves. jun. 572. *Strahan v. Sutton*, 3 Ves. 249. Devise of the residue of personal estate to wife, no bar of dower by implication.
(1)

VOL. I.

Page 231.

GOODINGE *versus* GOODINGE,

April 24, 1749.

(Reg. Lib. 1748. A. fol. 619.)

NOTES AND OBSERVATIONS.

Bequest to such of nearest relations as A. should think poor, and subjects of charity, confined to those within the stat. of Distributions, under A.'s advice.

[123]

THE words of the bequest were, "2000*l.* to such of his nearest relations, of the family of the *Edges*, as they should think the greatest objects of charity, in such manner and proportions as they, or the survivor, &c. should think fit;" and desired them "to take the advice and direction of his sister *Salisbury* in the distribution thereof, if she should be living."

It is to be observed, that he had, in a former part of his will, given Mrs. *Salisbury* the interest of 1000*l.* Old South Sea Annuities, for life. She stated by her answer, that she was the testator's only sister, and next of kin; and after having mentioned several persons who were the testator's first cousins, as being very poor and deserving of shares, and those for whom the testator intended to make a provision, &c.; and submitting her opinion concerning the distribution to the Court; she hoped, that if the Court should think the first cousins not entitled, it would consider the value of her legacy, and take care of her interest and share in the 2000*l.*; and she believed her legacy was not worth 300*l.* ready money, and her annuity was not worth seven years purchase, she being 70 years of age. It was, however, held, that Mrs. *Salisbury* was excluded from any share, by the dismissal of the bill.

In

GOODINGE
versus
GOODINGE,
April 24, 1749.

In the other cause the Court declared, “ that
“ the next of kin of the said testator of the family
“ of the *Edges*, who would have been entitled to
“ distributive shares of his personal estates, within
“ the Statute for Distribution, &c. in case he had
“ died intestate, ought to be construed as meant
“ and intended, by the description of nearest re-
“ lations in the bequest in question ; and that the
“ Defendants, the executors, *with the advice of the*
“ *Defendant, Mrs. Salisbury*, have the power of
“ judgment, which of such persons are the great-
“ est objects of charity; and that the *said De-*
“ *fendant, Mrs. Salisbury, is not to be considered*
“ *as one of such objects of charity*, within the in-
“ tention of the said testator’s will :” and decreed,
that the executors should, with the advice of the
Defendant Mrs. S. lay before the Master a list of
such of the testator’s nearest relations, within the
description before mentioned, as they judged to
be the greatest objects of charity; and should
also mention in such list the proportions in which
they, with the advice of the Defendant Mrs. S.
should think fit, that the 2000*l.* and interest,
should be distributed amongst such persons : and
in case any objection should be made before the
Master, that the persons mentioned in such list,
or any of them, were not of the next of kin of the
testator within the description aforesaid, it was
ordered that the Master should enquire into and
ascertain the same; and if the Master should
find that they, or any of them, were not such
persons, then the Defendants, the executors,
with the advice of the Defendant, Mrs. S. were to
propose other persons in their room : and any of
the testator’s nearest relations, of the family of the
K *Edges,*

[124]

GOODINGE
versus
GOODINGE,
April 24, 1749.

[125]

Edges, within the description aforesaid, were to be at liberty to come before the Master to controvert whether any of the persons named by the executors in their list were within the description before mentioned : and the Defendants, the executors, having admitted assets, the Master was to compute interest on the said legacy of 2000*l.* from the end of one year, &c. : and the Defendants, the executors, were to distribute and pay the said 2000*l.* and interest, amongst such persons as should be mentioned in such list, or finally ascertained by the Master to be within the said description, according to the directions aforesaid ; and the Defendants, the executors, were to produce receipts before the Master of such payments. And in case any of the persons who should, by virtue of the Decree and the directions aforesaid, be entitled to any share of the said 2000*l.* and interest, should be married women, the Court reserved the consideration of any directions touching the payment thereof, till after the Master's report. *Reg. Lib.*

The general rule is, that under a devise to "*relations*," or "*next of kin*," those only can take, who would have taken under the statute of distribution, in case of intestacy ; the shares and proportions, however, to be governed by the will. And it appears from the cases, that the words "*poor*" or "*poorest*," "*near*" or "*nearest*," preceding them, will not alter the construction ; though the construction may be enlarged, when warranted by the intention *appearing on the will*, and not from parol evidence. See the cases collected and stated 1 *Roper on Legacies*, 115, 118, 120, &c. inclusive. See also *Pyot v. Pyot*, 1 *Ves.* 335,

335, 337, et post, 161, and *Whithorne v. Harris*, 2
Ves. 527, &c.

GOODINGE
versus
GOODINGE,
April 24, 1749.

KING versus PHILIPS, May 6, 1749.
(Reg. Lib. 1748. A. fol. 413, entered "King v.
Newman.")

VOL. I.
Page 232.

NOTES AND OBSERVATIONS.

THE Plaintiff was the testator's only child, and a creditor under his marriage articles, whereby he covenanted to give to the children of the marriage (in the event which afterwards took place) by will or otherwise, one full third part of his real and personal estate.

The words of the will are stated in *Reg. Lib.* as follows; viz. "I will and desire that the agreement by me made and entered into upon my marriage with my late dearly-beloved wife, *Jane King*, be punctually complied with and performed. Item, I give to my sister *E. P.*; my niece *M. R.*; *T. M.* and *S. T.* gent. the sum of "10,000*l.* of lawful money, &c. in trust to lay out the same upon some government security, and pay the interest or dividends thereof for the education and maintenance of my daughter, *Mary King* (the plaintiff), till she arrive at the age of 21 years; and upon her attaining her age of 21 years, I will that the same be transferred to my said daughter."

The testator also gave the general residue of his real and personal estate to the Plaintiff, her heirs, executors, &c.

Legatee being a creditor under the testator her father's marriage articles, [126] an account directed of testator's personal estate at the making of his will, and his death; the legacy being so near in value, that it might defeat the rest.

KING
versus
PHILIPS,
May 6, 1749.

[127]

In the original suit the Defendants submitted, “ whether, since the testator had not left assets to “ answer the Defendant’s demands, and the several “ other legacies, the other legatees ought not to “ be parties thereto; that a complete Decree “ might be made to settle the parties’ rights, and “ the appointment to be made in respect of the “ several legacies and the Plaintiff’s demands, and “ that the Defendants might be indemnified “ against the demands of the several legatees, and “ a multiplicity of suits prevented.” The legatees were *not* made parties to that suit, but a bill was filed on their behalf, praying (*inter alia*) that *Mary King* might not take both under the settlement and will. The Decree was made in both causes.

The Master was also to enquire what was the value of the testator’s real estate to be sold, that was either descended to the Plaintiff, the infant, or devised to her by the testator’s will. *R. L.*

VOL. I.
Page 232.

SAYER *versus* PIERSE, May 1, 1749.

(*Reg. Lib.* 1748. *B. fol.* 255.)

NOTES AND OBSERVATIONS.

THE original bill, which had been filed about 20 years before the present hearing, prayed only for an account; the ascertainment of boundaries being introduced into a bill of revivor and supplement. The Court ordered the bill to be dismissed, so far as it sought an account, &c. before the time of filing the bill of revivor and supplement. As to the

the residue of the relief sought, the court decreed as in the Rep. the Defendant being restrained from setting up or making use of the time that had run since the filing of the bill of revivor and supplement, in order to support any defence under the statute of limitations in the ejectment. *R. L.*

SAYER
versus
PIERSE,
May 1, 1749.

COOKES *versus* HELLIER, May 3, 1749.

(*Reg. Lib.* 1748. *A. fol.* 657.)

VOL. I.

Page 234.

NOTES AND OBSERVATIONS.

(1) *VIDE Allen v. Poulton*, 1 *Ves.* 121, 122, *et antea*, 76, and 77, note. Also *Dillon v. Parker*, 1 *Swanst.* 359, &c. and *S. C.*, *Wilson, Ch. Ca.* 253, &c. For an elaborate view of the doctrine, and references to most of the important cases upon it, see Mr. *Swanston's* able and very useful note, 1 vol. 394 and *sequent.*

A person taking a benefit in personal or real estate, under a will, must abide by it in toto. Therefore an unsurrendered copyhold de-

[128]
creed to pass.

In the principal case the Court declared, "that it appeared that Sir *Thomas Cookes Winferd* took the estate in question, and enjoyed the same under the will of Sir *T. C.* the first testator; and that the enfranchisement taken by the said Sir *T. C. W.* of the said premises, from, &c. enured not only for the benefit of himself, but of all persons entitled thereto in remainder, under the will of Sir *T. C.*"

It therefore decreed, "that upon payment by the Plaintiff to the Defendant, in six months from that time, of the sum of 750*l.* being the consideration paid by the said Sir *T. C. W.* for such enfranchisement, the Defendant should, at the

(1)

COOKES
versus
HELLIER,
May 3, 1749.

" the expense of the Plaintiff, convey the said premises, with the appurtenances, to the use of the Plaintiff, and such other uses limited thereof by the will of the said Sir T. C. as were then existing," &c. R. L.

VOL. I.

Page 236.

PECK versus PARROT.

NOTES AND OBSERVATIONS.

Grant of personal estate by deed, to trustees, for a niece, after the death of the grantor, passes to her representatives, although the niece died in grantor's life-time. (1) Voluntary gifts, &c.

[129]

(1) SEE *Villers v. Beaumont*, 1 *Vern.* 100. *Allen v. Arne*, *ibid.* 365. *Bale v. Newton*, *ibid.* 464, and the other cases cited in the note to *Villers v. Beaumont*, p. 101.

The voluntary gifts must amount to a complete conveyance or transfer at law of the property, see 1 *Ves.* jun. 54, et vide 12 *Ves.* 46; a bill, therefore, for an assignment of subscription receipts, with an indorsement, signed by the owner, declaring that he thereby assigned to his daughter, the Plaintiff, all his interest, was dismissed; there being no evidence that he ever parted with the paper, which was found amongst the papers of his executrix. *Antrobus v. Smith*, 12 *Ves.* 39. See *Williamson v. Codrington*, 1 *Ves.* 511, 514 and the note, *postea* 215.

As to deeds and contracts, *not voluntary*, conveying or agreeing to settle *all* the grantor's personal estate (vide *per* Lord Hardwicke, p. 237). See *Randall v. Willis*, 5 *Ves.* 262, and the cases cited. *Jones v. Martin*, 3 *Anstruth.* 881, and more fully 5 *Ves.* 266, note. Et vide *Lewis v. Madocks*, 8 *Ves.* 150, 156, 157, &c.

THE

ROBERTS *versus* KINGSLEY, May 5, 1749.

(Reg. Lib. 1748. B. fol. 237.)

VOL. I.

Page 238.

NOTES AND OBSERVATIONS.

THE words of the Decree are these: "But the Plaintiff having taken a benefit by the devise in his father's will of the estate at S. and St. Peter's in the county of H. ought not to retain such devise, and at the same time be allowed to claim in contradiction to his said father's will." Wherefore it was referred to the Master "to allot a proper part of the estate comprised in the articles and settlement, of equal value, to be sold, to the money for which the said estate at S. and St. P. was sold under the former Decree." *R. L.*

Mistake—
Election—
Satisfaction—
Marriage settle-
ment rectified
by a strict set-
tlement agree-
ably to the
ordinary
course, not-
withstanding
it agreed with
the articles
verbatim, and
both made be-
fore marriage.

The Plaintiff, however, having taken a benefit under the will which he disputed, held to have made his election: and decreed to give up part of the settled estate in satisfaction.



WEST *versus* SKIPP, May 5, 1749.

(Reg. Lib. 1748. B. fol. 517.—And Reg. Lib.
1749. B. fol. 519.)

[130]

Page 239,
and 456.

NOTES AND OBSERVATIONS.

(1) The law described by Lord *Hardwicke*, page 242, as between one partner and the separate creditors of another, or his representatives, has of late years been confirmed and elucidated. Vide (*inter alia*) *Taylor v. Fields*, 4 *Ves.* 396. *Ex parte*

Ruffin,

Partnership—
Bankruptcy—
Representatives
of partner en-
titled to set off
debts, and have
all allowances
before

WEST
versus
SKIPP,
May 5, 1749.

before the se-
parate creditors
of the other
can take his
share; and
they have a
lien for such
demands. (1)

Ruffin, 6 *Ves.* 119, which is always mentioned as a leading case, and has been approved on frequent consideration. See 11 *Ves.* 4, 5. *Ex parte Williams*, 11 *Ves.* 3. See also, *ibid.* 83. 85. and *De Tastet v. Bordieu*, Mich. Term 1805, &c. &c. See also the case of *Skipp v. Harwood*, before Lord *Hardwicke*, in 1746, from a MS. note of Lord *Mansfield*, 2 *Swanst.* 586.

Ryal v. Rowles, frequently cited in the report, is in 1 *Ves.* 348. 375. In the principal case it was declared, that *Skipp* was entitled "to the same specific lien against the assignees as against the *Harwoods*:" and the bill, "so far as it ought to exclude *Skipp* from such property or specific lien, or to impeach the same, was dismissed. The former Decree was ordered to be performed and carried into execution between *Skipp* and the assignees, in like manner as the same ought to have been performed and carried into execution against the *Harwoods*, in case they had not become bankrupts: the Court reserving any directions as to the lien of the sisters, and as to any variations that might be necessary to be made in the said former Decree, as between the assignees and the sisters." *Reg. Lib.*

See a subsequent stage of this cause, 1 *Ves.* 456. *et postea*, 199.

VOL. I.
Page 246.

E. I. COMPANY *versus* CAMPBELL,
Exchequer, June 7, 1749.

NOTES AND OBSERVATIONS.

Demurrer to
Information
as subjecting
Defendant

- (1) See *East India Company v. Neave*, 5 *Ves.* 573
(2) Although Lord *Redesdale* in the third edition

edition of his valuable work on Pleadings in Equity, in note (k) at page 176, doubts the accuracy of the report of this case, his Lordship in a former part of his work (same edit. p. 14.) states the practice to be as above.

Mr. *Beames*, in his *Elem. Pl. in Eq.* pp. 320, 321, seems to consider it to be so settled.

In the case of *Baker v. Mellish*, 11 *Ves.* 68. the Court, after overruling a *demurrer*, gave leave to file one less extended. In the case of a *demurrer* overruled, the Defendant cannot put in a plea without leave of the Court. *Rowley v. Eales*, 1 *Sim. & Stu.* 511.

Upon a plea being overruled, the Defendant cannot *demur ore tenus*. *Hook v. Dorman*. 1 *Sim. & Stu.* 227.

Omichund v. Barker, cited p. 247, is in 1 *Atk.* 21.

E. I. COMPANY
versus
CAMPBELL,
June 7, 1743.

Defendant to
pains and pe-
nalties. (1)
A demurrer
may be put in
after a plea is
over-ruled. (2)

OWEN versus GRIFFITH, June 10, 1749.

(Reg Lib. 1748, B. fol. 294.)

(1) SEE *Cooper v. Scott*, 1 *Eden. Ch. Ca.* 17, which is also mentioned in Mr. *Brown's* note to *Wirdman v. Kent*, 1 *Bro.* 141. Vide etiam *Beames* on Costs, 189, 190, 191, 192.

It is to be observed, that although the Court in *Wirdman v. Kent*, 1 *Bro.* 140. made a variation in the Decree upon the appeal, it refused to make any variation as to costs; considering the alteration which it did make, merely as that which would have been made on further directions. See from the MS. note of Sir *S. Romilly*, 10 *Ves.* 572, and *Williams v. Beynon*, there cited to S. P. That
case

VOL. I.

Page 250.
S.C. Ambl. 520.

The rule that no appeal for costs merely, not to be strictly adhered to, if a sound distinction can be made: as where a fair incumbrancer is decreed only his principal and interest. (1)

OWEN
versus
GRIFFITH,
June 10, 1749.

case was to the following effect. It came upon a re-hearing, and the *gravamina* were that the Defendant ought to have been charged with interest and costs. The Court, though it did not think the claim of interest frivolous, and thinking that costs ought to have been given originally to the party making it, yet being of opinion that interest ought not to be given, refused the costs, which in substance was ultimately the only thing in question. From the MS. notes of Lord Colchester, in *Beame's Costs, Appendix*, p. 361.

In the principal case so much of the decree was reversed as directed a sum of 93*l.* 11*s.* 6*d.* reported due from the Defendant, to be paid into the Bank, and that the Defendant should deliver possession of the estate in question, and that no costs should be paid as between the Plaintiff and Defendant. And it was referred back to the Master to take an account of the rents, &c. subsequent to the Master's report received by the Defendant, &c. And what should be so found due was to be added to the said sum of 93*l.* 11*s.* 6*d.* reported due, &c.; and the Master was to tax the Defendant her Costs; and in case what should be found due to the Defendant for her costs, should be less than what should be reported due on the said account of rents, &c. the costs were to be deducted thereout, and the surplus paid into Court. But in case the costs should exceed the same, the Defendant was to deliver up possession on receiving payment of the surplus of such costs, and acknowledge satisfaction on the judgment obtained at law at the expence of the Plaintiff. But in default of such payment, &c., the bill was to stand dismissed with costs. *Reg. Lib.*

ROBINSON

ROBINSON *versus* GEE, June 10, 1749.
(Reg. Lib. 1748. B. fol. 522, entered "Robinson
v. Osgood.")

VOL. I.
Page 251.

NOTES AND OBSERVATIONS.

(1) It appears from *R. L.* that *Osgood Gee* admitted "he joined in the mortgage not only as surety for his brother, but also for his own sake, and to prevent the remainder and intail from being barred or cut off, and to preserve the same to himself." At the same time, however, he insisted, that he did not so do, in order that the same might come to him subject to the 1000*l.* at all events; nor was it agreed that the same should be paid thereout; but, on the contrary, that *Samuel* promised to repay the same in a year; and actually did repay 200*l.* part thereof; which (though it was afterwards borrowed again,) he submitted 'was a manifest proof that the estate was not to come to him subject to the 1000*l.* in all events, &c. &c. &c.

(2) See in *Priest v. Parrot*, 2 *Ves.* 160.

In the principal case *Mrs. Hauks*, was ordered to pay the costs of the suit, so far as related to these matters and the assignment. *R. L.*

Second tenant in tail joins in a mortgage and bond with the first, who receives the money lent. Held to be only a surety, and the real estate not liable in aid of the personal estate of the first, although he had joined in hopes to prevent a recovery. (1) Parol evidence of an agreement between the parties deemed inadmissible. Bond *ex turpi causa* delivered up. (2)

DOOR *versus* GEARY June 12, 1749.
(Reg. Lib. 1748. A. fol. 434.)

Page 255.

NOTES AND OBSERVATIONS.

(1) *VIDE Attorney General v. Pyke*, 1 *Atk.* 435, Legacy of stock and 2 *Roper* on Legacies 319, &c. See also *Selwood* erroneous description. (1) Satisfaction.

Supplement to the Reports in Chancery

DOOR
VERSUS
GEARY,
June 12, 1749.

wood v. Mildmay, 3 Ves. 306. *Dobson v. Waterman*, *ibid.* 308, note, and *Pentecost v. Ley*, 2 Jac. & Walk. 207.

Purse v. Snaplin, cited p. 256, is reported 1 Atk. 414. *Pacey v. Knolls*, cited *ibid.*, is in Cro. Car. 447. 473, and 1 Jo. 379.

In the principal case the bill was drawn in the alternative, *viz.* "either that the Defendant might transfer the 700*l.* Bank Stock, and all dividends thereof; or, in case the Court should be of opinion that the Plaintiff was not entitled thereto, then that they might be paid the 500*l.* and interest," which the husband had bound himself to give the wife.

[133]

The Decree declared, "that under all the circumstances of the case, the Plaintiffs were entitled to the 700*l.* capital Bank Stock, &c. by virtue of the will of the testator *N. G.* but that the same ought to be deemed as a satisfaction for the 500*l.* mentioned in the condition of the bond."

VOL. I.

Page 256,

WHITMEL *versus* FARREL, June 22, 1749.
(Reg. Lib. 1748. B. fol. 538.)

NOTES AND OBSERVATIONS.

No relief in Equity where an action at Law would not lie by reason of a substantial defect, such as a contingency not happening.

It was likewise stated as part of the consideration, "that the assignment of the lease should cease, and remain at the husband's disposal from the making of the settlement." *R. L.*

KIRKHAM

KIRKHAM *versus* SMITH, June 23, 1749.

(Reg. Lib. 1748. A. fol. 612.)

VOL. I.

Page 258.

S. C. Amb. 518.

NOTES AND OBSERVATIONS.

(1) SEE *The Countess of Shrewsbury v. E. of Shrewsbury*, 1 *Ves.* Jun. 227. *Jones v. Morgan*, 1 *Bro.* 206. 218, and *Amsbury v. Broun*, 1 *Ves.* 477, *postea* 202. and *Sargeson v. Sealey*, 2 *Atk.* 416, and the note.

Walpole v. Lord Conway, cited p. 259, is in *Barn. Rep. Ch.* 153. See 2 *Ves.* Jun. 707.

Ingram v. Ingram, cited *ibid.* is in 2 *Atk.* 88. *Noys v. Mordaunt*, cited p. 260, is in 2 *Vern.* 581. *Prec. Ch.* 265. *Gilb. Eq. Rep.* 2. Vide 2 *Rop.* on *Leg.* 404. [134]

(2) As to contribution, see *Lloyd v. Johnes*, 9 *Ves.* 37. Contribution, (2)

GRAHAM *versus* GRAHAM, June 26, 1749. Page 262.

(Reg. Lib. 1748. A. fol. 678.)

NOTES AND OBSERVATIONS.

(1) As to the advantages of a Dowress suing in Dower. Equity in preference to the Common Law, see in *Satisfaction.* *Curtis v. Curtis*, 2 *Brown.* 620. and the notes in *Court in taking* *Mr. Bell's* edition. *general ac-* *counts, making* *an allowance to*

widow for arrears of dower, will not put her to a fresh suit for future profits, but will decree them. (1) If a testator is chargeable with two annuities, and devises an annuity equal but to one, it will not be a satisfaction for either.—*Contra*, where he is not a general debtor for both.

VOL. I.

Page 264.

ASTON *versus* ASTON, June 27, 1749.

(Reg. Lib. 1748. A. fol. 702.)

NOTES AND OBSERVATIONS.

The Court will restrain tenants for life *without impeachment of waste* to a reasonable exercise of their right.

(1) Owner of a charge not to be presumed to have released it by permitting it to run largely into arrear; nor, without proof, to be suspected of so doing to prejudice those in remainder.

[135]

(1) SEE *Vane v. Lord Barnard*, 1 Salk. 161. 2 Vern. 738., *Prec. Ch.* 454. *Bishop of London v. Web*, 1 P. W. 527. *Bewick v. Whitfield*, 3 P. W. 267, 5th edit. *Chamberlayne v. Dummer*, 1 Bro. 166, and 3 Bro. 549. *Marquis Downshire v. Lady Sandys*, 6 Ves. 107. *Williams v. Macnamara*, 8 Ves. 70, 71. For a most elaborate note on the subject; and as to the origin and progress of the doctrine upon the privilege "*without impeachment of waste*," see 2 *Swanston Rep.* 145, *et sequent.*

The bill submitted, "that if the widow had such an extraordinary privilege as a jointress as to be punishable of waste, the same must have been inserted by inadvertency, and without design; and that she ought not to exercise such power: or, if given her by design, that she ought to exercise it in a reasonable manner; being a provision made by her husband; and ought not, by colour thereof, to destroy or prejudice the inheritance, &c. And it stated that she had raised, by sale of the timber and saplings, above 1500*l.* and not left a tree on the premises fit for any repair; and that she was so unreasonable as to insist upon the Plaintiff being at the expence of the repairs, and procuring timber for them, though she knew they had no timber in that neighbourhood, or county, fit for the purpose."

The Court declared, "that from the nature and
apparent

apparent intention of the settlement of the 2d of September 1703, the Defendant, Lady *Aston*, ought not to be permitted to have any benefit of the trust of the term of 500 years thereby created, for reimbursing to her such money as she had or should expend and disburse in the repairs of the estate thereby limited to her for her jointure, without making satisfaction for the prejudice done by her to the inheritance of the estate, by cutting down such timber, saplings and young trees, as were not proper to be felled according to the usual course of felling timber upon estates in a reasonable and husbandlike manner." And referred it to the Master "to take an account how much the said jointure estate had been damnified by reason of any timber, saplings, or young trees, which had been so felled by the Defendant, Lady *A.* or by her order, which ought not to have been felled, according to the usual manner of felling timber upon estates in a reasonable and husbandlike manner; and the Master was to take an account of all such money as the Defendant, Lady *A.* had expended, or disbursed, in repairs upon the said jointure estate, which had not been reimbursed to her out of the rents and profits of the estate comprised in the term of 500 years, and also an account of what was necessary to be laid out to put the said jointure estate in tenantable repair And it was decreed that so much as the Master should find such damnification of the said jointure estate amounted unto, should be deducted out of what should appear to have been so laid out by the Defendant Lady *A.* in repairs, or should be necessary to be laid out to put the same into tenantable repair; and if there should be any surplus

*ASTON
versus
ASTON,*

June 27, 1749.

[136]

ASTON
versus
 ASTON,
 June 27, 1749.

plus that should appear to be laid out in such repairs, it was declared that the same ought to be raised according to the trusts of the term of 500 years contained in the settlement. And it was further decreed, that the residue of what should appear to be necessary to be laid out in such repairs should be paid by the Defendant Lady *A.* for that purpose: but if what the Master should ascertain to be the amount of such damnification should exceed the money that had been laid out, or should be found necessary to be laid out in such repairs, then the Court reserved the consideration of any directions touching the application of such residue till after the Master's report. "And
 "it appearing, by the proofs in this cause, that
 "the trees that are left standing upon the jointure
 "estate are of so small growth and value, as not
 "to be fit to be made use of, even for repairs of
 "the said estate; it is further ordered, that the
 "Defendant, Lady *A.* be restrained from felling
 "or cutting down any more timber or trees upon
 "the said estate till the further Order of this
 "Court."

[137]

Upon the other points, it was referred to the Master to take an account of what was due to the Defendant Lady *A.* for the arrears of her annuity, or rent charge of 300*l.* a year, to which she was entitled under the said settlement of 1703; and also an account of what was due to her for the interest of the sum of 3100*l.* charged by the will of Sir *T. A.* upon part of the estate in question, in the county of Norfolk, at the rate of 4 *per cent. per annum.* And the Master was to inquire what arrears of rent were due to Sir *T. A.* the son, at the time of his death, from the tenants of the
 lands

lands and premises comprised in the term of 500 years, created by the settlement, and likewise what arrears of rent were due to Sir *T. A.* the son, at the time of his death, from the tenants of the Norfolk estate, upon which the said 3100*l.* was charged, and how much thereof was received by the Defendant Lady *A.* or by any other person by her order, or for her use, &c. &c. &c.

ASTON
versus
ASTON,
June 27, 1749.

Abrahall v. Bubb, cited in the principal case; p. 265, is reported 2 *Freem.* 55. and 2 *Show.* 68. A most valuable note of it may now be seen from Lord *Nottingham's MSS.* in 2 *Swanst. Rep.* 172.

VOL. I.

Page 268.

Vide S. C.

Ca. Temp. Talb.
44, and 1 Atk.
581, Mr. San-
ders's edit.

HOPKINS *versus* HOPKINS, June 3, 1749.

(*Reg. Lib.* 1748. *B. fol.* 644.)

NOTES AND OBSERVATIONS.

It was declared, "that the Petitioner *John Hopkins*, was entitled to all such rents and profits of the real estate, and produce of the personal estate, as incurred or became due between the birth and death of *John Osborne* [his grand-child], and it was ordered accordingly."

(1) See *Bullock v. Stones*, 2 *Ves.* 521. Et vide *Belt v. Mitchelson*, *Ch.* Dec. 17, 1811. *postea.* 227.

Contingent remainder upon executory devise.

[138]

Rents and profits undisposed of belong to the owner of the inheritance, or persons entitled to the enjoyment. (1)

VOL. I.

Page 271.

CHAPMAN *versus* HART, June 29, 1749.

(Reg. Lib. 1748. A. fol. 695.)

NOTES AND OBSERVATIONS.

Devise of all lands and tenements in or near F. by a will attested by two witnesses only, where the testator had freehold, will not pass leasehold.—*Contra*, if he had only had leasehold. Bequest of goods on-board a ship, is good, though they may have been afterwards removed, and were not on board at the testator's death. The Court will not supply the surrender of a copyhold in favour of a wife or child, under [139] a merely presumed intention to devise it. (1.)

Rose v. Bartlett, is in *Cro. Car.* 292. Et vide *Ithell v. Bean*, 1 *Ves.* 215, et antea 114, note. See also per Lord Eldon C. 6 *Ves.* 640, &c.

(1) *Church v. Mundy* (12 *Ves.* 426, and 15 *Ves.* 396) was nearly the case put by Lord Hardwicke, towards the top of page 273. Sir *W. Grant*, M. R. had determined accordingly; but Lord Eldon, C. on the appeal, seemed to be of a different opinion. See 15 *Ves.* 396. 407. The Lord C. held clearly, that a surrender of the copyhold should be supplied if no freehold.

The *Countess of Aylesbury's* case, cited p. 273, is in *Amb.* 68, but corrected and accurately stated 11 *Ves.* 662. *Et nota.*

On the principal case, the bill was dismissed as to the leasehold lands, and accounts were directed of the testator's personal estate not specifically bequeathed; "and in order to determine, and ascertain what are the specific legacies given by the said testator's will to the Plaintiff, it is ordered, that the Master do inquire and take an account of all such goods and chattels as were in the testator's house at Fowey, at the time of his death, and therein specify the particular pieces of plate, if any, that were in the said house. And that the said Master do also inquire and take an account of such goods and chattels of the said testator as at the time of making his will were on board the ship *Warwick*, and be-
" fore

"fore his death were removed out of the said ship
 " *Warwick* on board any other, and what ship ;
 " and that the said Master do particularly specify
 " what pieces of plate were on board the said ship
 " *Warwick* and removed into any other ship as
 " aforesaid." And it was declared, that no securi-
 ties for money, nor other choses in action, passed
 by the testator's will by the bequest of goods and
 chattels in his house, or on board the said ship
Warwick, and that the same could only extend to
 goods and chattels in possession. And as to such
 goods and chattels in possession as did pass by
 that devise, the Court reserved the consideration
 of any directions relating thereto until after the
 Master's report. *Reg. Lib.*

CHAPMAN
 versus
 HART,

June 29, 1749.

Neither choses
 in action, nor
 securities for
 money, pass
 under a bequest
 of " goods and
 chattels."

POTTER *versus* POTTER, July 6, 1749.

(*Reg. Lib.* 1748. B. fol. 385.)

VOL. I.

Page 274.

NOTES AND OBSERVATIONS.

Ogle v. Cook, cited ther is in 1 *Ves.* 177, et
ante 103.

In the principal case the Plaintiffs were to be at
 liberty to exhibit interrogatories in the Examiner's
 office, &c. and to be at liberty to reply, &c. and
 the parties were to be at liberty to examine any
 witnesses to any of the matters in issue ; and to
 examine the witnesses already examined, notwith-
 standing such their examination. *Reg. Lib.*

Answer of heir
 believing that a
 will was made,
 will not prevent
 the necessity of
 its being proved.

[140]

VOL. I.

Page 274.

LEWIS *versus* HILL, July 6, 1749.

(Reg. Lib. 1748. B. fol. 556.)

NOTES AND OBSERVATIONS.

Covenant in marriage articles to purchase and settle lands. Lands purchased, and suffered to descend, taken in satisfaction of it. (1)

The purchase of houses in London will not satisfy a covenant to purchase lands of inheritance. (2)

(1) Though this immediate case was terminated by consent, it seems clearly to have been so, upon the ground of the law being thus generally settled, and of circumstances rather affording an inference in favour of the application than otherwise. It is observable, that the testator by his will *took notice of the covenant*, so far as it related to his wife's jointure; and that after reciting that no such settlement had been made, he devised to her an equal annual sum, by way of rent charge. *R. L.*

As to the point of law being thus settled, see *Attorney General v. Whorwood*, 1 *Ves.* 534, 540, &c. *Deacon v. Smith*, 3 *Atk.* 323, and Mr. Sanders's notes.

The report is a little inaccurate at the top of page 275, for the bill was not brought by the heir at law, but by persons claiming under a conveyance from those who, at that time, were the covenantor's heirs, and entitled under the covenant. *R. L.*

(2) See the Report, p. 275. Vide etiam *S. P. Pinnell v. Hallet*, 2 *Ves.* 276, *et postea*, 344.

The administratrix insisted, "that the lands
"purchased, and suffered to descend, were such
"as would answer the covenant; and conse-
"quently, in case the Plaintiffs could insist on
"any satisfaction of the covenant, the estates so
"purchased, &c. ought to be taken as a full satis-
"faction in case the yearly rents *at the time of*
"making

"making such purchase, should appear to have
"been 600*l.* a year; and if not, then for so much
"of the 600*l.* a year as the yearly rents amounted
"unto."

LEWIS
versus
HILL,
July 6, 1749.
[141]

It was ordered, by consent of all parties, (*inter alia*) "that the messuages and farms at and near
"D. and also near U; and the messuages and
"tenements in and near Fetter-lane, London,
"purchased by Sir R. H. and permitted to de-
"scend to his heir at law, together with 5200*l.*
"N. S. S. annuities, and 2768*l.* 5*s.* 4*d.* by the
"Decree before directed to be paid by the De-
"fendant, should be accepted by the Plaintiffs in
"full satisfaction of the said articles, and of the
"Plaintiff's claims and demands, by or under the
"same," &c. *Reg. Lib.*

Debenham v. Ox, July 7, 1749.

(1) Though Lord *Hardwicke* in the principal case (page 277), refused the Plaintiff his costs, upon the grounds of his being *particeps criminis*, Lord *Eldon*, C. held that the principle which made the Court give relief, must also allow the costs; which his Lordship gave accordingly. *Jackman v. Mitchell*, 13 *Ves.* 581. Mr. *Beames*, in his able and useful work on Costs in Equity, prefers the course adopted by Lord *Hardwicke*. Vide pp. 167, 168.

Bonds in fraud of agreement, &c. set aside on public policy.

(1)
Qy. Whether a plaintiff who succeeds in setting them aside should have his costs. (1).

KEMP versus WESTBROOK, July 8, 1749.

(*Reg. Lib.* 1748. A. fol. 602.)

VOL. I.

Page 278.

NOTES AND OBSERVATIONS.

THE Master was directed to take an account of what remained due on the 15th of February 1732-3

Bill lies by Assignees of a Bankrupt for account

Kemp
versus
WESTBROOK,
July 8, 1749.

Account and
delivery of
goods pledged
by the bankrupt,
notwithstanding
the statute of
limitations.

[142]

1732-3 (the date of the last note exhibited in the cause), for principal and interest of the money advanced and lent by the Defendant to the bankrupt, on the pledge of the jewels, plate, and effects, mentioned in the original note from the Defendant to the bankrupt, dated the 7th of January 1728-9, and to carry on interest on so much of the principal as remained due. He was also to take an account of the jewels, plate, and effects specified in the last mentioned note, and to see which of them remained in specie in the custody or power of the Defendant, and what part thereof had been sold, or otherwise disposed of by the Defendant. And as to such part thereof as had been sold or disposed of, it was ordered, that the Master should take an account of the real value thereof, and that the value of such part thereof as had been so sold or disposed of by the Defendant, should be applied in the first place towards paying the interest, and then towards sinking the principal of what should be so found to have been due to the Defendant for the money lent or advanced by him as aforesaid. And if, upon the balance of the said account, any thing should be found to remain due to the Defendant for principal or interest, then, on payment thereof by the Plaintiff, &c. at such time, &c. the Defendant should deliver to the Plaintiff such part of the said jewels, plate, and effects, as should be found to remain in specie; but in default, &c. the bill was to stand dismissed, &c. And in case it should appear on the said account, that the Defendant was overpaid his said principal and interest, then the Defendant was to pay to the Plaintiff so much as should remain due to the Plaintiff on the said account : and
also

also to deliver to the Plaintiff such part of the said jewels, plate, and effects, as should remain in specie, to be applied as part of the personal estate of the bankrupt for the benefit of the creditors seeking relief under the commission. *Reg. Lib.*

KEMP
versus
WESTBROOK,
July 8, 1749.

UNDERWOOD *versus* HITHCOX,
July 11, 1749.
(No Entry.)

[143]
VOL. I.
Page 279.

Specific performance of

agreement refused under the circumstances, the consideration money being inadequate.

BURLEIGH *versus* PEARSON, July 12, 1749. Page 281.
(No Entry.)

Mansey v. Walker, there cited, is in *Ca. Tem. Talbot*, 72.

Power of appointment by a father not well executed; being contrary to the intention, as

collected from a reasonable construction of the recital of the deed, which created the power. "And" construed "or."

JOHNSON *versus* MILLS, July 17, 1749. Page 282.
(*Reg. Lib.* 1748. A. fol. 597.)

NOTES AND OBSERVATIONS.

This case was an appeal from the Rolls. His Honour's Decree was affirmed.

Executor bound to set apart a fund to answer future demands under a contract.

BARNESLY

VOL. I.
 Page 284.

BARNESLY *versus* POWEL, July 18, 1749.
 (Reg. Lib. 1748. A. fol. 583, 585.)

NOTES AND OBSERVATIONS.

Forged will.

S. C. 1 *Ves.* 119, *et antea*, 74.

Bransby v. Kerrick, cited p. 285, and 287, is in 7 *Bro. P. C.* 437, octavo edit.

[144]

The Court declared, “ that the merits of the
 “ cause upon the original bill do principally de-
 “ pend upon the question touching the validity of
 “ the paper writing, dated the 16th day of October
 “ 1736, purporting to be the will of *William*
 “ *Barnesly*, Esq. deceased; and that if the same
 “ should be found to have been duly executed by
 “ the said *W. B.* deceased, the Plaintiff in the
 “ original cause cannot be entitled to be relieved
 “ against the same; but, if the said paper writing
 “ shall be found to have been forged, then the
 “ Plaintiff in the original cause, as son and heir
 “ of the said *W. B.* will be entitled to be relieved
 “ in this Court against all the agreements, debts,
 “ writings, and assurances, relating to his said
 “ father’s estate, obtained from him by any of the
 “ Defendants in that cause since his said father’s
 “ death, and also to be relieved against the said
 “ Plaintiff’s consent, contained in the order of the
 “ Prerogative Court of the 12th day of May 1742,
 “ and the said decree of the Court of Exchequer of
 “ the 6th day of December 1742, in such manner
 “ as shall be agreeable to the rules of Equity,
 “ unless the paper writings bearing date re-
 “ spectively the 18th and 19th days of June, 1735,
 “ exhibited

“ exhibited by the Defendant *Mansel Powel* in
 “ this cause, and produced by him under the
 “ Order of this Court, dated the 25th day of July
 “ last, though not mentioned in his answer, should
 “ appear upon all the circumstances of this case to
 “ be sufficient both in Law and Equity to bar the
 “ said Plaintiff *W. B.* of the relief sought by him
 “ by the original bill as to his father's real estate.
 “ His Lordship doth therefore Order, that the
 “ parties do proceed to a Trial at Law at the Bar
 “ of the Court of King's Bench by a Special Jury
 “ of the county of Hereford, at such time as that
 “ Court shall appoint, upon the following issues;
 “ to wit, first, Whether the said paper writing,
 “ dated the 16th day of October 1736, was duly
 “ published by the said *W. B.* deceased, as his
 “ last will and testament, and signed by the said
 “ *W. B.* and attested and subscribed in his pre-
 “ sence by three credible witnesses? and, secondly,
 “ Whether the said paper writings, bearing date,
 “ respectively, the 18th and 19th days of June
 “ 1735, were sealed and delivered by the said
 “ *W. B.* deceased? And the Plaintiff in the original
 “ cause is to be Plaintiff at Law, and all the De-
 “ fendants in that cause, except the Defendants
 “ *Mr. Attorney General, Gale, and Mary Powell,*
 “ are to be the Defendants, &c. &c. It is further
 “ ordered, that none of the agreements, deeds,
 “ writings, or assurances, that have been obtained
 “ from the said Plaintiff *W. B.* by any of the said
 “ Defendants, or executed by him to any of the
 “ said Defendants since his father's death, nor his
 “ consent contained in the said Order of the Pre-
 “ rogative Court, nor the said Decree of the Court
 “ of Exchequer, be insisted upon, or produced in
 “ evidence

BARNESLY
 versus
 POWELL,
 July 18, 1749.

[145]

The issues at
 law.

BARNESLY
versus
POWEL,
July 18, 1749.

[146]

“ evidence by the said Defendants or any of them.
 “ And, if upon the said trial, the Jury shall find
 “ the said paper writing, dated the 16th day of
 “ October 1736, not to have been duly executed by
 “ the said *W. B.* deceased, as his will, then it is
 “ further ordered, that an indorsement be made
 “ on the “*venire facias* or *distringas*, whether
 “ such verdict is grounded on forgery, or upon any
 “ particular defect in the execution thereof. And
 “ all deeds, papers, and writings, relating to the
 “ matters in question in the custody or power of
 “ any of the parties, or of Mr. *B.* the said Plain-
 “ tiff’s committee, are to be produced before the
 “ said Master, upon oath, before the last day of
 “ Michaelmas Term next, except such as by the
 “ Orders of this Court have been left in the hands
 “ of the Defendant *Mansell Powell’s* clerk in Court,
 “ or of Mr. *Owen*, the Defendant *S. B.’s* Solicitor.
 “ And, as to these, it is further ordered, that they
 “ do remain in the same custody where they now
 “ are, subject to the further Order of this Court.
 “ And as to all such deeds, papers, and writings,
 “ as shall be either produced before the said
 “ Master, or shall remain in the hands of the De-
 “ fendant *M. P.’s* clerk in Court, or of the
 “ Defendant *B.’s* Solicitor as aforesaid, any of the
 “ parties are to be at liberty to inspect the same,”
 &c. “ And the penalty of the recognizance al-
 “ ready given by the Defendant *Mansell Powel*,
 “ to account for the rents and profits of the estate
 “ in question as the Court shall direct, appearing
 “ to be no more than 3000*l.*, it is further ordered,
 “ that the said Defendant *M. P.* do give a further
 “ security to be approved of by the said Master, in
 “ the penalty of 2000*l.* with the like condition as
 “ is

“ is contained in the former recognizance given
 “ by him, on or before the last day of Michaelmas
 “ Term next, or, in default thereof, that the said
 “ Master do appoint a proper person to be receiver
 “ &c. [with the usual directions]. And it is
 “ further ordered, that an injunction be awarded,
 “ to restrain the said Defendant *Mansell Powel*,
 “ his servants, workmen, and agents, from com-
 “ miting of any waste or spoil upon the estate in
 “ question, till the further order of this Court,”
 &c. &c.

BARNESLY
 versus
 POWEL,
 July 18, 1749.

[147]

The Trial at Bar appears to have lasted several days. After a full hearing, the Jury found in favour of the Plaintiff on both of the issues. And they found, and it was marked on the *distringas* as follows: viz. as to the first issue, the Jury “ground their verdict on forgery, and not on any “particular defect in the execution of the will.” See *Reg. Lib.* 1748. *A. fol.* 585.

Upon the cause coming on for judgment on the Equity reserved (10th July, 1749,) the Court dismissed the cross bill of *Mansell Powel*, with costs; and in the original cause decreed, “that all the agreements, deeds, writings, and assurances relating to the estate of *William Barnesly*, the father, which had been obtained from the Plaintiff, *W. B.* by any of the Defendants in the original cause since his father’s death; and also the two releases, dated respectively the 25th of January, 1737, and the 10th of February, 1736, should be set aside, and be delivered up, upon oath, to the committee of the Plaintiff, the lunatic, by such of the Defendants, in whose custody or power the same respectively were, to be cancelled; and that such of them as had been brought before and left with the
 Master,

BARNESLY
versus
POWELL,
July 18, 1749.

[148]

Master, should be delivered out to the Plaintiff's committee to be cancelled; and upon all such agreements, deeds, writings, assurances, and releases, which were in the custody or power of the Defendant *Mansell Powel*, being delivered up as aforesaid; it was further ordered, that the release from the Defendant *M. P.* to the Plaintiff, dated the 25th January, 1737, should be delivered up by the Plaintiff's committee to the Defendant *M. P.* to be cancelled; and that the Defendants *M. P.* and *S. B.* should be restrained from making use of, or insisting upon, the decree made in the Court of Exchequer, dated the 6th of December, 1742, and from claiming any benefit thereby: and that the Defendant *M. P.* should deliver to the Plaintiff's committee the possession of all the real estate in question for the Plaintiff's use: and that the Master should enquire whether the Defendant *S. B.* was in possession of any part of the real estate, which belonged to *W. B.* the father, at the time of his death; and if the Master should find that he was, then the said *S. B.* should deliver possession of such part, &c. &c.: and that the Defendants *M. P.* and *S. B.* should deliver all deeds, court rolls, court books, papers, and writings in the custody or power of them, or either of them, relating to the real estate of *W. B.* the father, upon oath, to the committee of the Plaintiff for his use: and that the said *M. P.* and *S. B.* should, at their own expence, by such conveyances and assurances as the Master should approve, convey and assure to the Plaintiff and his heirs all the real estate of the said *W. B.* the father; and that all proper parties should join in such conveyances and assurances as the Master should direct. The
Master

Master was to take an account of the rents and profits of the real estate of *W. B.* the father, accrued since his death, which had been received by the Defendants *M. P.* &c. &c.: and in case it should appear that the Defendant *S. B.* was, or had been, since the said *W. B.* the father's death, in possession of any part of the real-estate: then the Master was to take an account of the rents and profits of such part, &c. &c.; and the Defendants *M. P.* and *S. B.* were respectively to pay to the Plaintiff's committee what should be found due upon the balance of those accounts for the benefit of the Plaintiff, the lunatic; and in taking such accounts, the Master was to make unto all parties all just allowances, and particularly an allowance to the Defendants *M. P.* and *S. B.* of all such sums of money as they, or either of them, had paid to the Plaintiff, or by the order, or for the use of, the Plaintiff, or for the maintenance of the Plaintiff, or of his wife. The Master was to appoint a receiver, &c. &c. And as to the relief sought by the original bill, touching the personal estate of the said *W. B.* it appearing that the probate of the said will in the Prerogative Court was obtained by fraud and imposition upon the Plaintiff, in consequence of the deed of the 10th of May, 1742, and the deed or writing of proxy executed by the Plaintiff, under his hand and seal, mentioned in the order of the Prerogative Court, dated the 12th of May, 1742; it was further ordered and decreed, that the said Master, before whom the probate or letters testamentary granted to the Defendant *S. B.* had been brought, should cause the same to be transmitted to, and lodged with, the registrar of the Court of Delegates, before

BARNESLY
VERSUS
POWELL,
July 18, 1749,
[149]

BARNESLY
versus
POWEL,
July 18, 1749.
[150]

before whom an appeal was brought from the said probates by the committee of the Plaintiff, the lunatic, on his behalf; and that the Defendant *Mansell Powel* should, within a fortnight after the beginning of the then next term, bring in and deposit with the said registrar, the probate of the said will or letters testamentary granted to him; and that the Defendants *B.* and *Powel* should, within a week after such probates or letters testamentary should be so brought in and lodged with the said registrar, appear in the said Court, either by themselves or their proctor or proctors respectively, and consent to a reversal of the sentence, for granting the said probates, or either of them, and to the revocation of both the said probates or letters testamentary, to the intent to enable the said Court of Delegates by such consent as aforesaid, to cause the said probates or letters testamentary to be duly revoked according to the course of that Court; and that the Defendant *Powel* should be at liberty, within three weeks after the said probates or letters testamentary should be revoked, to exhibit and propound in the Prerogative Court the paper writing, dated the 9th of *September*, 1735, insisted upon by the Defendant *Mansell Powel*, in his answer, to be a will of the said *W. B.* deceased, and to proceed with effect, according to the course of the said Court, to obtain probate thereof, as he should be advised; but in case the said Defendant *P.* should not, within three weeks after the revocation of the said probates or letters testamentary, exhibit and propound the said paper writing, dated the 9th of *September*, 1735, as aforesaid; or in case the Defendant *P.* should exhibit and propound the said paper

paper writing of the 9th of *September*, 1735, *within the time aforesaid; and the same should be finally determined in the Ecclesiastical Court not to be the will of the said *W. B.* deceased; then it was further ordered and decreed, that the Defendants *M. P.* and *S. B.* should, within a week after either of those cases should happen, by themselves or their proctor or proctors respectively, consent, in the said Prerogative Court, that letters of administration may be granted of the personal estate of the said *W. B.* deceased, to the Plaintiff's committee, on the behalf and for the use and benefit of the Plaintiff. And in case the said Defendant *M. P.* should exhibit and propound the said paper writing of the 9th of *September*, 1735, in the Prerogative Court, and not proceed thereupon with effect, then the Plaintiff was to be at liberty to apply to the Court [of Chancery] for further directions touching the same, to the end that the personal estate of the said *W. B.* deceased, might be secured and forthcoming, for the benefit of such of the parties as should appear to be entitled thereto; and it was further ordered and decreed, that *Mansell Powel* and *S. B.* should forthwith bring before the Master, upon oath, all mortgages, bonds, notes, and other securities for money, in their, or either of their, custody or power, which were part of, or belonging to, the personal estate of the said *W. B.* deceased; and that the said Defendants should come to an account for the said *W. B.* deceased's personal estate received by them, &c. &c.; the balance of which they were to pay into Court, without prejudice to any claims or demands, or to any other allowances, which any person whatsoever might thereafter appear

BARNESLY
versus
POWEL,
July 18, 1749.
[*151]

[152]

BARNESLY
versus
POWEL,
July 18, 1749.

appear to have, or be entitled to, out of such personal estate, &c. &c.

And it was ordered, that the Defendants *Mansell Powel* and *S. B.* should pay to the committee of the Plaintiff his costs of the suit to that time, and also his costs at law, to be taxed by the Master: and as between them the Court reserved the consideration of subsequent costs, until after the Master's report. See *Reg. Lib.* 1748, *A. fol.* 585.

VOL. I.

Page 290.

Second born son may take under a limitation "to the first son," he being so at the time. (1)

LOMAX versus HOLMDEN, July 22, 1749.

(Reg. Lib. 1748. B. fol. 455.)

NOTES AND OBSERVATIONS.

(1) SEE *Emery v. England*, 3 *Ves.* 232.

Page 297.

Plea of a general agreement and composition of accounts (1) good, without its being a minute strict settlement of items.

SEWELL versus BRIDGE, July 24, 1749.

(Reg. Lib. 1748. B. fol. 396.)

NOTES AND OBSERVATIONS.

(1) SEE *Townsend v. Loufield*, 1 *Ves.* 37, et antea 31; et vide 2 *Ves.* 482, 565; postea, 390, 391.

HEARLE *versus* GREENBANK, Aug. 3, 1749.

(Reg. Lib. 1748. A. fol. 698.)

VOL. I.

Page 298.

S.C. 3 Atk. 695.

NOTES AND OBSERVATIONS.

SEE the Decree accurately stated in 3 *Atkins*.

Quod vide.

Casburn v. English, cit. p. 301, is in 1 *Atk.* 603.

Sir *Edward Clere's* case, cit. p. 302, is in 4 *Vin. Ab.* 168, pl. 26. S. C. 6 *Bro. P. C.* 152, octavo edit.

[153]

Noys v. Mordaunt, cit. p. 303, is in 2 *Vern.* 581.

As to the power of *feme covert* over her separate estate, vide *Allen v. Papworth*, 1 *Ves.* 163, *et antea*, 88. *Grigby v. Cox*, 1 *Ves.* 517, 518, *et post.* 2 *Ves.* 75, 190, *et postea*; and *Hyde v. Price*, 3 *Ves.* 437.

The case mentioned by Lord *Hardwicke*, p. 305, is *Lady Travel's* case. See the rep. of the principal case in 3 *Atk.*

BECKFORD *versus* TOBIN, Nov. 4, 1749.

Page 308.

(Reg. Lib. 1749. A. fol. 53.)

NOTES AND OBSERVATIONS.

(1) VIDE *Crickett v. Dolby*, 3 *Ves.* 10. *Mitchell v. Bowes*, *ibid.* 282. *Sitwell v. Bernard*, 6 *Ves.* 520. *Gibson v. Bott*, 7 *Ves.* 89, 94, 97, &c. See also *Schoales* and *Lefroy's* Reports, and *Lambert v. Parker*, *Coop. Rep. Ch.* 143.

Construction of will. Interest of legacy from death of testator, on the manifest intent as to maintenance.

(1)

VOL. I.

Page 312.

See S. C. at the
original hear-
ing. 3 Atk. 1.
S.C. 1 Will. 3.

LACAM *versus* MERTINS, Nov. 8, 1749.

(Reg. Lib. 1749. B. fol. 93 and 147.)

[154]

Page 313.

BEARD *versus* TRAVERS,
November 9 and 13, 1749.

(Reg. Lib. 1749. A. fol. 26.)

NOTES AND OBSERVATIONS.

Attempt to
marry a Ward
of Court clan-
destinely.

THE Order in question was, "that the infant
" should not be married without the leave of the
" Court, nor suffered to go out of *England*; and
" that neither Lord *Montague*, nor Lady *M.* nor
" Mr. *Brown*, the son of Lord *M.* should have
" any access to the infant, nor write any letter or
" letters to her; and that the infant should not be
" permitted to have access to Lord *M.* nor Lady
" *M.* nor Mr. *B.* or any of them; nor to write any
" letter or letters to them, or any of them, during
" such time as she should remain in the custody
" and under the care of Lady *Primrose*."

Page 314. JOHNSON *versus* SMITH, November 10, 1749.

(Reg. Lib. 1749. A. fol. 126.)

NOTES AND OBSERVATIONS.

Election —
Deed-poll not
delivered, (1)

(1) SEE *Peck v. Parrot*, 1 Ves. 236, 237, *et antea*,
128.

but

Oliver

Oliver v. Brickland, cit. p. 315, is in 3 *Atk.* 420.
Shudal v. Jekyll, cit. *ibid.* in 2 *Atk.* 516.

JOHNSON
 versus
 SMITH,
 Nov. 10, 1749.

The bill stated, that *William Johnson* several times requested the devisee to intermarry with him, and particularly on the 5th of March and 21st of May, and on the 14th, 20th, and 21st of June, 1743 (the testator having died in the month of January), but that she had refused, &c. : and after the expiration of *six months from the testator's death had acknowledged the same, and yielded up possession* of the real estate. "And a question being made in the cause, whether the Defendants *Sir Edward Smyth* and his wife, are entitled to the rents and profits of the real estate, accrued after the testator's death, until the *end of six months* after such death, his Lordship declared, that the Defendants, *Sir Edward Smyth* and his wife, are entitled thereto," &c. *Reg. Lib. ubi supra*, fol. 128.

but operating at the death of [155] grantor, and a bond given in favour of a natural daughter. She was put to her election. Gift over, on A.'s refusal to marry B. The forfeiture held not to take place from an offer being declined once or twice, but from a more formal acknowledgment. (2)

(2) See upon this point *Taylor v. Popham*, 1 *Bro.* 168, and the notes in Mr. *Bel's* edition.

The Defendants insisted they were entitled to all such "sums of money as were out at interest, and due or owing to *J. J.* upon the day of the date of the instrument, as specifically given and assigned to them, against every one but Mr. *Johnson's* creditors; and that by virtue of the bond they were well entitled to 10,000*l.* and interest for the same, to be paid in the first place by and out of such personal estate as the said *J. J.* was possessed of at the time of his death; and in case such personal estate should prove deficient, then out of his real estate, which the Defendants believed was *Joseph Johnson's* real intention." *R. L.*

Supplement to the Reports in Chancery

JOHNSON,
versus
SMITH,
Nov. 10, 1749.

[156]

After declaring the will well proved, &c. it was declared, that the Defendants, Sir *Edward Smyth* and Dame *Elizabeth* his wife, in right of the said *Elizabeth*, were not entitled, both to the benefit of the deed and of the bond, but were entitled to elect either of them, as they should think most for their benefit; "and it being admitted on the part of Sir *E. S.* and his wife, that it will be most for their advantage to take the benefit of the said bond, it is ordered and decreed, that it be referred, &c. to compute interest on the said sum of 10,000*l.* at the rate of 2*l.* per cent. per annum from the date of the said bond to the end of three months after the death of the said testator *J. J.*; and from that time at the rate of 5*l.* per cent. per annum." The Master was also to take an account of all other the testator's debts; and of his funeral expenses; and likewise an account of his personal estate received by the Defendants, Sir *E. S.* and his wife, &c. &c. In case the personal estate should not be sufficient to pay the Defendants what should be found due for principal and interest of the said bond, in the course of administration, a sufficient part of the real estate was to be sold, and the money arising thereby applied in payment of so much of what should be found due to the Defendants, and the other specialty creditors of the testator, as his personal estate would not extend to satisfy. Directions were then given for marshalling the assets, and taking the accounts of the rents and profits of the real estate, agreeable to the declaration of the Court above-mentioned, &c. &c. &c. and the Defendants, Sir *E. Smyth* and his wife were ordered to be paid their costs up to the hearing.

hearing; subsequent costs being reserved. *Reg. Lib.*

JOHNSON
versus
SMITH,
Nov. 10, 1749.

DUROUR versus MOTTEUX, Nov. 21, 1749.

(*Reg. Lib.* 1749. A. fol. 253.)

[157]

VOL. I.

Page 320.

NOTES AND OBSERVATIONS.

(1) SEE *Fletcher v. Ashburner*, 1 Bro. 497; *Mortmain*; and *Ackroyd v. Smithson*, 1 Bro. 503. *Brown v. Bigg*. 7 Ves. 279. *Sheddon v. Goodrich*, 8 Ves. 481. Conversion of realty into personalty. (1) Residuary bequest. Real estate directly to be sold and together with personal, applied (*inter alia*) to charitable purposes, and "that the

(2) "In case of lapse of real estate the heir takes; but in the case of personal property, the residuary legatee is preferred either to the next of kin or the executor." Per Lord Eldon, C. 8 Ves. 25; in *Cambridge v. Rous*. Vide 1 Ves. 141. and 2 Roper on Legacies, 487, &c.

The residuary legatee must, however, be a general, and not a partial one; for if the will gives a legatee what remains after payment of legacies, he will not be entitled to any benefit from lapses. See the cases, 2 Roper on Legacies, 490, &c.

"&c." Held; first, that the bequest as to the charity, was void; and next, that the whole, as to other matters, was turned into personalty. Residuary bequest of personalty includes every thing; as a void legacy, or one that has lapsed. (2)

KNIGHT versus DUPLESSIS, Nov. 23, 1749. Page 324.

NOTES AND OBSERVATIONS.

Andrews v. Powys, cit p. 325, is in 2 Bro. P. C. 504, octavo edit.

trovert the will, unless there are strong circumstances.

The Court will not appoint a receiver on bill by heir against a devisee to convert the will, unless there are strong circumstances.
ANONYMOUS

[158]

VOL. I.

Page 326.

Vide S.C. 1 Ves.
409, et postea.Enrolment of
Decree vacated,
being procured
too expedi-
tiously. (2)

ANONYMOUS (1), November 23, 1749.

(Reg. Lib. 1749. B. fol. 40.)

NOTES AND OBSERVATIONS.

(1) UPON inspecting the minute book, the name of this case appears to be "*Wright v. Wright*"; and it is the case reported 1 Ves. 409.

(2) See 1 Ves. 205, and *Pickett v. Loggan*, 5 Ves. 702; the Court, however, will not open an inrollment where the Decree has been made upon the merits. 16 Ves. 114.

This motion was on the part of the Defendant, who stated, that the Decree having been pronounced but on the 24th of the preceding month and drawn up, the Defendant was advised to appeal therefrom; but that the Decree having been passed a week before the application, the Plaintiff, to prevent such appeal, hurried on, so as to procure the inrollment within two days afterwards, before eleven o'clock, though the Defendant entered a caveat at the Docquet Office, on the same day, likewise before eleven o'clock, but too late, nevertheless, to prevent the Decree being signed.

Upon the cause coming on afterwards, by way of appeal, the former Decree was reversed, and the bill dismissed with costs. See 1 Ves. 409. Reg. Lib. *ubi supra*, et postea.

BILLON *versus* HYDE,
November 25 and December 11, 1749.
(Reg. Lib. 1749. A. fol. 227, entered "*Billon v. Hanbury.*")

[159]
VOL. I.
Page 326.

NOTES AND OBSERVATIONS.

(1) By a late Act of Parliament, 46 Geo. III. c. 135, all conveyances, payments, contracts, dealings, and transactions, by and with any bankrupt *bona fide* made or entered into *more than two calendar months before the date of the commission*, are declared good and effectual, notwithstanding the prior act of bankruptcy, provided the parties have not, at the time of such conveyances, &c. any notice of a prior act of bankruptcy committed by such bankrupt; or that he was insolvent, or had stopped payment. Vide that Stat. in connection with 49 Geo. III. c. 121. for other particulars.

Relief in account, as to payments made to a bankrupt after a secret act of bankruptcy, (1) when the assignees had recovered by action payments made by the bankrupt..

The bill alleged, that the Plaintiff in Equity had, at the trial, insisted on his present claims; viz. that if he was to be charged with the monies he had received, it was but just and reasonable that the monies he had actually paid should be set off against the former, and that a verdict should only be given for the remainder; and that the Plaintiff had proved the payment of several of the sums, and was prepared to prove the residue; but it being alleged that it was unnecessary for him to do so at that time, since the Commissioners would settle the account, he, the Plaintiff, did not proceed any further in the proof, not doubting but that he should have such allowance before the Commissioners. The bill then set forth particularly

[160]

BILLON
versus
HYDE,
Nov. 25, and
Dec. 11, 1749.

larly the several sums advanced, and stated, that upon the Plaintiff's making application to the Commissioners, they refused or declined to set off the amount of such payments. It therefore prayed to have an allowance of them.

It was by consent agreed, that the assignee should deduct and allow to the Plaintiff the said sum of 712*l.* 2*s.* out of the money received by the assignees at law against the Plaintiff in Equity. No costs were to be paid on either side. *R. L.*

Though the *actual* termination was *on consent*, it seems to have been *founded on the opinion of the Court*.

VOL. I.
Page 331.

ROW *versus* DAWSON, Nov. 27, 1749.
(*Reg. Lib.* 1749. *B. fol.* 89.)

NOTES AND OBSERVATIONS.

THE costs of all parties were directed to be paid out of the remainder of the Exchequer monies, after deducting the monies to be paid by *Tonson* and the executors of *Cowdery*.

Page 333.

THOMAS *versus* KETTERICKE,
December 5, 1749.
(*Reg. Lib.* 1749. *B. fol.* 113.)

PyOT *versus* PYOT, December 6, 1749.

(Reg. Lib. 1749. B. fol. 112.)

[161]

VOL. I.

Page 335.

NOTES AND OBSERVATIONS.

(1) The words of the will were "the nearest relation of the name of *the Pyotts*," and not of the name "Pyott," as stated in the report. See what is relied upon by Lord *Hardwicke* at p. 338, and per Mr. J. *Lawrence*, in the important case of *Leigh v. Leigh*, 15 *Ves.* 99. per M. R. 17 *Ves.* 262, per Lord *Eldon*, C. 19 *Ves.* 300, &c.

Devise of real and personal estate in trust for the nearest relation "of the name of *Pyotts*," (1)

(2) See *Roach v. Hammond*, *Prec. Ch.* 401. As to real estate alone, see *Rayner v. Mowbray*, 3 *Bro.* 234. As to the cases in general, vide *Goodwinge v. Goodwinge*, 1 *Ves.* 231, 232, *et antea*.

The latter held to be "nomen collectivum," and descriptive of that particular stock; and that this mixed fund (2) should not go to the heir at law of that name. A change of the name of *Pyott*, by marriage, held not to exclude.

In cases of the kind relative to personalty, it appears clearly that although the Statute of Distribution be the rule and measure of the distribution where the will is select, the will nevertheless "will be the guide as far as possible; for the Stat. "is substituted only where the intention cannot "be made out." *Greenwood v. Greenwood*, 1 *Bro.* 30, 32, note. See generally in *Wright v. Atkins*, 17 *Ves.* 255, and 19 *Ves.* 299, &c. &c.

The case mentioned at the end of the report, p. 338, as in the House of Lords, is *Barber v. Bute-man*, 3 *P. W.* 65, and 4 *Bro. P. C.* 194, octavo edit.

The point there decided was also so held in *Leigh v. Leigh*, 15 *Ves.* 92.

The Editor is anxious to correct and to apologize for a mistake which occurred at this place in the former edition of the work. He was led by some

Pyot
versus
Pyot,
Dec. 6, 1749.

some means, *now unknown to him*, to believe and state that the expressions were not "*of the name of the Pyotts*," but merely "*of the Pyotts*." The Reg. Book, to which he refers as an authority for this, certainly does not warrant it. He apprehends the error to have arisen from some MS. notes which he had prepared for a new edition of Mr. Vesey's Reports, many years before the publication of this Supplement.

[162]

VOL. I.

Page 339.

GAMMON *versus* STONE, Dec. 7, 1749.

(Reg. Lib. 1749. A. fol. 132.)

NOTES AND OBSERVATIONS.

Bill of surety in a bond to have it assigned after having paid its amount, dismissed with costs, as useless. (1) Right to principal and interest generally carries costs. Tender must be very express and formal to prevent costs.

(1) *BILLS*, however, are very frequently filed in the Court of Exchequer *to have void Policies of Insurance delivered up*; and they are sometimes followed up by Decrees, upon the principle of preventing vexatious demands. See 7 *Ves.* 20, 21, 249. Vide *Woffington v. Sparks*, 2 *Ves.* 569, *postea* 418.

It appears that the Plaintiff *had actually paid* the money. The Decree is as follows: "The matters in difference between the said parties, for and touching which the Plaintiff, by her bill, seeks to be relieved, coming on this day to be heard, &c. : *and it being admitted that the Defendants have been paid* the principal and interest due on the bond in question, and their costs at law, *by the Plaintiff*, and the Plaintiff now waving the praying any assignment of the said bond from the said Defendants, his Lord-

" ship

"ship saw no cause to give the Plaintiff any relief
"in equity, and therefore dismissed the bill with
"costs." R. L.

GAMMON
versus
STONE,
Dec. 7, 1749.

WALMSLEY versus CHILD, Dec. 11, 1749.

[163]
VOL. I.

NOTES AND OBSERVATIONS.

Page 341.

Glyn v. B. of England, cited p. 342, 343, ap-
pears in 2 *Ves.* 38.

(1) *Vide ex parte Greenway*, 6 *Ves.* 812, 813;
and see *E. I. Company v. Boddam*, 9 *Ves.* 464.

(2) Although the doctrine stated by Lord
Hardwicke, towards the bottom of page 343, once
prevailed; namely, that the mere bearer of a note
"payable to A. or bearer," could not formerly
maintain an action on it (yet see *Hinton's case*, 2
Showers, 235), it is now entirely settled otherwise,
Vide Grant v. Vaughan, 3 *Burr.* 1516, &c.; and
1 *Black. Rep.* 485. See also the last edition of
Mr. *Chitty's* work on bills of exchange, 90.

No relief in
equity on lost
instrument,
where no affida-
vit of the loss,
and no offer of
indemnity. (1)
As to action on
note payable to
A. or bearer. (2)
And as to action
on lost bond. (3)

(3) In an action upon a bond, a profert was ab-
solutely requisite in the greater part of Lord *Hard-
wicke's* time, as stated in page 345 (yet see 1 *Ves.*
388, 393).

Lord *Eldon C.* (referring, it seems, to this and a
subsequent case, 1 *Ves.* 392, 393) says, "I have
"found in Lord *Hardwicke's* own hand his most
"positive declarations, that upon such an instru-
"ment it is impossible to maintain an action
"without profert. The law, however, is now set-
"tled otherwise. *Read v. Brookman*, 3 *T. R.* 151."
Vide ex parte Greenway, 6 *Ves.* 812, 813.

The wisdom of the old Law, in keeping the two
jurisdictions

Modern prac-
tice of Courts of
Law in dispens-
ing with pro-
fert. This by no
means destroys
or affects the
ancient and ac-
knowledgeed ju-
risdiction of
Courts of
Equity.

WALMSLEY
versus
CHILD,
Dec. 11, 1749.
[164]

jurisdictions separate, and the mischief of innovation in the above point, is most fully illustrated in *ex parte Greenway, ubi supra*; in 7 *Ves.* 20, &c. and in 9 *Ves.* 466, &c.

Though the judges have thus extended their jurisdiction, they do not give the party against whom the action is brought the same benefit as he would have in a Court of Equity, since the Plaintiff *there* is obliged to make an affidavit of the loss, and that the instrument is not in his possession or power; and inasmuch also as the Courts of Law are unable to secure a proper indemnity. Vide *ubi supra*, and especially 9 *Ves.* 466, 467, *quâ nota* Lord C.'s observations on the Act 9 and 10 *Will.* III. c. 17. § 3.

Notwithstanding this assumption of Jurisdiction by the Courts of Law, it is perfectly clear that it neither has, nor can destroy the ancient Jurisdiction of the Courts of Equity. Vide *ubi supra, passim.*

VOL. I.
Page 347.

SCHELLINGER versus BLACKERBY,
December 16, 1749.
(*Reg. Lib.* 1749. B. fol. 114.)

The grant of a menial office in the House of Lords for a term of years, liable to creditors; and a daily fee, or allowance, held to be subject also. (1)

(1) This case first came on in 1745, on Appeal from the Rolls. The following note of it is from a MS. collection of Lord Colchester, with the use of which his Lordship kindly favoured the Editor. Mr. Blackerby devised one part of his estate (which was a reversion or a lease for life) to his son; another part to two persons who had been his sureties; another part to Trustees to pay several

several particular debts due to the Crown. To his daughter *Ann* he gives the office of housekeeper of the King's Palace at Westminster, of which he had a patent; and then he directs that his house at St. Alban's Street, and all his plate, and all other his personal estate should be sold, and all persons to be paid their debts; and all the rest, residue, and remainder not thereby devised he gives to his two daughters share and share alike.

SCHELLINGER
VERSUS
BLACKERBY,
Dec. 16, 1749.

This was a bill brought by the simple contract creditors of the Testator to have satisfaction out of the office, and out of the whole estate devised to the several devisees.

This office was granted to the testator, his executors and administrators, for the term of 31 years; and the Master of the Rolls was of opinion that it was assets, and directed that *A. B.* the devisee who had been admitted and sworn into the office, should have a handsome allowance for executing &c. and should account for the profits.

Attorney General for the Defendant. It would be strange to say that all offices which a man dies possessed of shall be assets. If they are assets they must be such as are capable of being disposed of, and of being taken into execution. This is nothing but a personal office, and the devisee comes in by the admission of the Lord Chamberlain, who hath sworn her into the office. It is a rule that a personal office cannot be disposed of because it depends upon a personal trust and confidence in the person.

Mr. Brown for the Plaintiffs, said that it had been held that the office of Coal Meter was within the Acts of Parliament relating to bankrupts.

Lord Chancellor. Is this an office which the Defendant

SCHELLINGER
versus
BLACKERBY,
Dec. 10, 1749.

Defendant makes by the will? It is granted to the Testators, his Executors, and Administrators. There might be an objection indeed to the ordering it to be sold, because it might be sold to such persons as would be disagreeable to the Crown. It hath been held that the office of a Steward and Registrar in the West Indies should be sold for satisfaction of debts.

Attorney General. If every office in which a man hath a term for years, shall be assets, the office of Sheriffs, which is granted for a term, would be assets.

Lord Chancellor. Why not? This is not a personal office. If it was personal to the Grantee, it would be of another consideration. Here the Crown hath not considered it as such, for it cannot know who will be the executors of the Grantee. If it should come to an improper person, how far the Crown may have a power over the office, I do not know. There are many offices executed by deputy, which are not saleable. The executors would here take it as part of the personal estate, and then it must be assets. The true objection is that these offices *should not* be granted in this manner. *Bellamy v. Burrough*, was a stronger case than this; that was an office not saleable, and was necessary for the administration of justice.

Attorney General. As to what estate is by the will subject to the debts, it cannot affect those that are particularly devised; for this is not like the case of those general directions in a will where it begins with saying, "Item, my debts being paid, I devise my freehold, &c. but the interest here is to devise the several estates mentioned, before the debts should be paid."

The

The Chancellor. This is a very different case from those which have been cited. The Court hath gone a great way to satisfy creditors, and if there have been any words in a will which will assist them, the Court hath taken advantage of them, though perhaps they might be inserted for a different purpose. If a man begins his will with saying, "after my debts are paid I give my estate in such a manner;" the Court hath held that no devise of the real estate should take effect till the debts are satisfied. And so where it is "I direct that all my just debts be paid," and then devised his real and personal estate; the Court hath held the real estate as subject to debts. *Warrington and Booth*, is a strong case. The 1st direction there is, "That all my first debts be paid;" then he gives particular debts to be paid out of particular estates; yet the Court held the whole estate subject to debts so far as the personal estate would not satisfy. All the cases are where the direction is in the first part of the will, and so runs through the whole. Here the testator hath devised particular parts of the estate to particular devisees; one part to his son, who was his heir at law; another for the payment of particular debts; and then he says, "Item. I direct that my house in St. Alban's Street, (which appears to be leasehold) and all my plate, &c. and all other my personal estate, be sold, and all persons paid their debts. All the residue and remainder of my estate, not hereby devised, I give to my daughters share and share alike." "All and every person to be paid, &c." is brought in the clause in which he is making a disposition of his personal estate: and if there were no other words, would be confined to that only.

SCHELLINGER
versus
BLACKBURN,
Dec. 16, 1749;

SCHELLINGER
versus
BLACKERBY,
Dec. 16, 1749.

only. A man hath a real and personal estate, and makes particular devises of his real estate, and names his executors, and gives to them all his personal estate, and directs that all and every person shall be paid, &c. : *these words would charge only the personal estate; they being in the clause in which he named his executors, and disposed only of his personal estate.* *Eq. Ca. Ab.* 198. *Trott v. Vernon*, 2 *Vern.* 708. That is a case within the general rule where a man gives such directions as run through the whole will. *Cloudsly v. Pelham*, differs from this; the devisee there was directed to pay the debts, and the Court intended that the debts must be paid out of the estate which he took; for it could never be the testator's intention that the devisee should pay the debts out of his own money. If there is any estate not particularly devised, that will be affected. The clause relating to the payment of his debts, refers to the preceding clause relating to his personal estate, and to the subsequent one relating to the rest and residue of his real. *From the MS. collection of Lord Colchester.*

[165]
VOL. I.

RYALL versus ROWLES, Jan. 27, 1749-50.

NOTES AND OBSERVATIONS.

Page 348.
S.C. Atk. 165,
quod vide, with
Mr. Sanders's
notes.

Pawnees of
goods, &c.
permitting
bankrupts

(1) SEE 1 *Bos. & Pul.* 86.—Though “debts” in general are within the stat. 21 *Jac. I. c.* 19, § 10, 11, yet mortgages of *real* estate (whether original or by assignment) are *not*: and their being also secured by bond or covenant makes no difference. Vide *Jones v. Gibbons*, 9 *Ves.* 407.

Ex

Ex parte Marsh, cited p. 352 and 365, is in 1 *Atk.* 158, 159. *Stephens v. Sole*, cited *ibid.* and p. 361, appears also 1 *Atk.* 157. 161. 170.

Borne v. Dodson, cited p. 353, is in 1 *Atk.* 154. Vide 2 *Ves.* 272, &c.

Brown v. Heathcote, cited p. 361, is in 1 *Atk.* 160.

(2) See p. 353.—In order to make an effectual assignment of debts, so as to completely divest the party, he must have every thing equivalent to a delivery of chattels personal, as far as the case admits of: such as an assignment and delivery of the securities, where any; and [as it seems] have given notice of the assignment to the debtor.—Without this latter, the party indebted might safely pay the original creditors. Vide 9 *Ves.* 410.

As to the lien, &c. as between partners, mentioned p. 353, vide *West v. Skipp*, 1 *Ves.* 239. 242, et antea 130. Et vide 9 *Ves.* 410. *Ex parte Ruffin*, 6 *Ves.* 119, &c. 11 *Ves.* 4, 5. *Ex parte Fell*, 10 *Ves.* 347. *Ex parte Williams*, 11 *Ves.* 3.

(3) There must be some mistake in the reporter, p. 360. It is not a general rule that a first mortgagee shall be postponed by mere negligence in omitting to obtain the title deeds.—To effect that, the case must amount to Fraud.—See per Lord Eldon C. in *Evans v. Bicknell*, 6 *Ves.* 183.

RYALL
versus
ROWLES,
Jan. 27, 1749-50.

bankrupts to continue in possession, or in the order and disposition of them, have no specific lien on them against the assignees. (1)

Assignment of debts. (2)

Equities as between partners.

[166]
Neglect of first mortgagees, as to title deeds, &c. (3)

—
PYKE versus PYKE, Jan. 31, 1749-50.

(Reg. Lib. 1749. B. fol. 177.)

VOL. I.

Page 376.

NOTES AND OBSERVATIONS.

THE Covenant was to settle "lands in Ireland,

N

Covenant by husband before marriage to settle of

Pyke
versus
Pyke,
Jan. 31, 1749-50

settle lands in jointure for wife, and other part for the issue of the marriage, her fortune to remain in trustees till such settlement made. The husband dying insolvent, without performing it, the wife's fortune survives for her own benefit, and the issue not

of the clear yearly value of 400*l.* sterling, as money was valued in that kingdom; in such manner, that immediately from and after the decease of her said husband, the Plaintiff should enjoy the same for her life, as her jointure."

It is stated in *Reg Lib.* as from the bill, that the husband *had* an estate in Ireland, but that it was so loaded with incumbrances that the Plaintiff's fortune was not nearly sufficient to pay off such as were prior to the articles; for which reasons the executors of the Plaintiff's father did not think it advisable to apply the Plaintiff's fortune in discharge of them.

— *Perkins v. Lady Thornton*, cited p. 377, is in *Amb.* 502.

the issue not entitled to take it from her.

[167]

VOL. I.

Page 379.

CRAY versus MANFIELD, Feb. 7, 1749-50.

(*Reg. Lib.* 1749. A. fol. 658.)

Sir J. Strange, M. R.

NOTES AND OBSERVATIONS.

Voluntary conveyance, by one lately come of age (1) to an agent, of a reversion of no great value, for a nominal consideration of 180*l.* (2) and containing covenants as in the case of a purchase, not

(1) SEE *Hylton v. Hylton*, 2 *Ves.* 347, *et postea*, 405. 3 *Woodd. Appendix*, 16. *Hatch v. Hatch*, 9 *Ves.* 292, and *Wood v. Downes*, 18 *Ves.* 120, 127.

(2) The Report p. 379, should have stated the deed as "for a nominal consideration," &c.

(3) Vide *Oldham v. Hand*, 2 *Ves.* 259, *et postea* 337. The Author of these notes ventures, with all due deference, to doubt the propriety of the decision in the principal case: and he conceives from the solemn and just consideration which has been applied

applied to such instances in late cases, that a conveyance under the circumstances stated, *would now be set aside in toto*. See *Wood v. Downes*, 18 *Ves.* 129, 136, &c. Vide nevertheless *Montesquieu v. Sandys*, 18 *Ves.* 302, 313.

As to *Pierce v. Waring*, cited p. 380, see also 2 *Ves.* 548. *Walmsley v. Booth*, cited *ibid*, is in 2 *Atk.* 25. 27, and *Barn. Ch. Rep.* 475.

In the principal case, the Defendant (*inter alia*) stated his hope "that the said conveyance being
"not obtained by fraud, deceit, or circumvention,
"but being the effect of a constant determined resolution, for three years and upwards, and being
"intended partly as a reasonable compensation
"for the Defendant's expences, on occasion of the
"Defendant's entertaining him, his friends, and
"attendants, and partly as a bounty and kindness;
"and being executed with due consideration and
"deliberation, and without any sort of undue influence, he should therefore enjoy the benefit
"thereof, and that the said conveyance should not
"be set aside, or delivered up."

The Court dismissed the bill so far as it sought to set aside the deed, or to have the same delivered up, to be cancelled; and decreed, that the Defendant should, at his own expence, "execute to
"the Plaintiff a special release of all the covenants
"contained in the said deed, *reciting the said deed*,
"and that the said covenants are improper covenants to be contained in a voluntary deed, and that
"the Defendant admits the said deed to be a voluntary deed, and that he paid no consideration for
"it." The Master was to settle such release in case the parties differed about it, and no costs were to be paid on either side. *Reg. Lib.*

CRAY
versus
MANFIELD,
Feb. 7, 1749-50.

absolutely rescinded, (3) as not being a case of fraud; but the transaction modified by Decree, that the agent should release the covenants at his own expence, and recite the impropriety of them as referable to a gift.

[168]

VOL. I.

Page 383. TRAVERS *versus* BULKELY, Feb. 8, 1749-50.

S.C. 1 Dick. 138.

Husband being abroad, a wife having appeared, and obtained an order to answer separately, whereby she freed herself from process of contempt, will not be allowed to have her own acts set aside.

(Reg. Lib. 1749. B. fol. 175.)

NOTES AND OBSERVATIONS.

Burton v. Malone, cited p. 385, is in *Barn. Ch. Rep.* 401.

As to *Dubois v. Hole*, 2 *Vern.* 613, mentioned p. 386, see Mr. *Raithby's* note.

[169]
Page 387.

WHITFIELD *versus* FAWCET,
February 10, 1749-50.

(Reg. Lib. 1749. B. fol. 451.)

Purchaser of an equitable title to a rent-charge claiming against some purchasers of the land for a valuable consideration without notice, must try his title at Law, in the name of his vendors. (1)

What amounts to notice.

Draft of a deed, traced into possession of Defendant's family, very good evidence. (2)

Where a party may come into

Equity

(1) As between the Plaintiff and the Defendants, the *Fawcets*, the bill was retained for 12 months, with liberty for the Plaintiff to distrain for the arrears, &c. or to take such other remedy at Law for the same, in the name of the Defendants, the *C.'s*, as he should be advised; and that he should indemnify those Defendants, &c. And in case it should happen that any such further assurance as was before mentioned in that decretal order, should be executed by the defendants, the *C.'s* to the Plaintiff, before any distress should be made, or action at Law brought concerning the said arrears; then the Defendants, the *F.'s*, were not to set up the same, or take advantage thereof in any action of replevin, or any other action to be brought for such arrears, &c. &c. &c.

It appears from the Registrar's Book of the next year (January 19th) that the Defendant *B. F.* had

died

died since the decretal order, and that, before his death, a distress was made on the premises ; that the distress was replevied, and that the Plaintiff in replevin had declared thereupon ; so that the cause was likely to come to trial at the next assizes. *Reg. Lib.* 1750, *B. fol.* 159.

It appears, however, from a subsequent part of the same book, that on the 11th of the following July, the Plaintiff obtained an Order to dismiss his bill without costs upon the Defendant's consent, he having been since advised to proceed no further therein. *Fol.* 532.

(3) Vide *Walmsley v. Child*, 1 *Ves.* 345, *et antea* 163, and 1 *Ves.* 505.

(4) The position of Lord *Hardwicke*, towards the top of page 391, is controverted by Lord *Mansfield*, C. J. His Lordship says, that the doctrine thus broadly laid down, viz. that "a rent-charge is gone by a fine of the land," is totally mistaken, and by no means warranted by the case in *Carter*: and that the rule is universal, that a rent-charge, in a third person, is not barred by a fine and non-claim.

Vide *Goodright dem. Hare v. Broad* and *Jones*. 1 *Cruise on Fines*, 249, 251, 252. Vide *ibid.* 248.

WHITFIELD
versus
FAWCET,
Feb. 10, 1749-50

Equity on the loss of a deed. New practice at law of dispensing with profert. (3)

[170]

Bill retained for 12 months, with liberty to bring an action, &c. but afterwards dismissed voluntarily without a trial. As to dispensing with profert of a Bond at Law. Evidence as to loss of a deed. (3)

As to a fine of land not barring a rent-charge of a third person, issuing there-
(4)

VANESSEN versus EAST INDIA COMPANY,
February 24, 1749-50.

(*Reg. Lib.* 1749. *B. fol.* 287, entered "Van
Essen v. Count of Slippenbach.")

NOTES AND OBSERVATIONS.

(1) The case being rather singular, the Author
of

The whole line
of process
having

VOL. I.

Page 395.

S.C. 1 Dick. 140.
quod vide.

VANESSEN
 VERSUS
 E. I. COMPANY,
 Feb. 24, 1749-50

having been
 gone through

[171]

against the
 Plaintiff's hus-
 band, who had
 not appeared, is
 equal to the
 proceeding to
 outlawry at
 Law, and there
 may be a De-
 cree for trans-
 fer of her sepa-
 rate property
 against the
 other Defend-
 ants, who did
 appear.

of these notes has thought it right to state it some-
 what particularly; though the substance of it ap-
 pears in 1 *Dickins* 140.

The bill was filed by *Susannah Elix. Van Een*,
 by her next friend, against her husband the Count
 of *Slippenbach*, and the South Sea Company, pray-
 ing that the husband might set forth whether he
 had any objection, and what, against the Plaintiff
 receiving the dividends, and interest due, and to
 grow due, on the S. S. stock mentioned in the bill,
 and transferring the said stock to whom the Plain-
 tiff should think proper; and that the Defendants,
 the South Sea Company, might be decreed to pay
 to the Plaintiff, or to whom she should appoint,
 all interest and dividends due, or thereafter to
 grow due on the said stock, and to permit her, or
 whom she should appoint, to transfer the said
 stock to such person or persons as she should
 think fit, without the concurrence of her husband.

For this end the bill stated, that in January
 1742, the Plaintiff being a widow, and possessed
 of a considerable personal estate, and among other
 things, of 3,500*l.* Old South Sea Annuities; she
 and her husband before their intermarriage on the
 first of February 1742, appeared before the per-
 sons, and in the presence of certain persons at the
 Hague, and mutually signed an instrument, ac-
 cording to the laws of Holland, by which they
 declared their intention to engage in marriage, and
 that they had beforehand bargained and agreed
 that in case the marriage should take effect, there
 should not be any of the least community of
 goods, effects, or estate between them, but that
 the Plaintiff should have the same free and absolute
 power, government, administration, management

an

and disposition, as well of all her goods, effects, and estate, then in her possession, as she had had during her widowhood, without being controuled by her said husband, and that he should not assume any authority over the said estate; and that he, by the said instrument, disclaimed and renounced all power over her said estate which he could or might have in right of his marriage. The bill then, after alleging that the marriage took place soon afterwards, and the Plaintiff's husband having spent a considerable part of her estate, and her refusing to let him have any more of it, proceeded to state that a misunderstanding arose between them; whereupon they, in July 1743, agreed to be separated from table, bed, and cohabitation: which agreement was ratified and confirmed by the Sentence and Decree of the Court of Holland. That the Plaintiff having found some difficulty in receiving and getting into her possession some of her effects which were out of Holland, by her husband's refusing to intermeddle in her affairs, he declaring they did not concern him, she, the Plaintiff, by her petition to the said Court of Holland, reciting the agreement between her and her husband before their marriage, and also their marriage, and separation, prayed that the Court would qualify and empower her solely, without her husband, to receive, possess, and administer, all her goods and effects, whatsoever; and wheresoever, and to dispose thereof, and manage all her affairs herself, as well in law as otherwise; whereupon the said Court having examined the contents of such petition, and heard the report of the commissioners, before whom she and her husband appeared, and having taken notice

VANESSEN
versus
E. I. COMPANY.
Feb. 24, 1749-50
[172]

VANESSEN
versus
 E. I. COMPANY,
 Feb. 24, 1749-50
 [173]

notice of the said declaration of her husband, decreed according to the terms of the petition. That a considerable sum being due to her for the interest and dividends on the said 3500*l.* S. S. stock, she had applied to the Defendants, the S. S. Company, to pay the same to her, and permit her to transfer the stock as she should think fit: but that they refused so to do, without a proper direction or power from her husband; whereupon she applied to and requested her husband to join with her in executing a proper instrument to empower some persons to receive the dividends, &c. &c. for her use, and to join in a transfer; but that her husband refused, alleging, that he had nothing to do with her estate or effects, and therefore did not chuse to concern himself therewith; so that she was kept out of her dividends, and also hindered from disposing of the stock.

The Defendants, the Governor and Company of the South Sea, admitted the stock to be in their books, and that the applications alleged had been made relative to it; but stated, that the party who so applied, was told, that there being no trustee in whom the stock was vested for the Plaintiff's separate use, the Company could not, according to the Laws of England, with safety, permit a transfer of the same, or pay the dividends thereon without the consent of the Plaintiff's husband, unless they were indemnified by the direction of some proper Court of this kingdom. And they professed their readiness to act as the Court should direct.

The Decree is entered in the following terms,
 " And whereas the said Defendant, *Casimir* Count of
Slippenbach, whose constant residence is beyond
 " sea,

“ *sea, hath been duly served with process to ap-
 “ pear to, and answer, the Plaintiff’s bill, and
 “ refusing so to do, all process of contempt, to a
 “ sequestration, have regularly issued against him
 “ for want thereof; and he persisting in his said
 “ contempt, a commission of sequestration, under
 “ the seal of this Court, was thereupon regularly
 “ awarded against him; notwithstanding which
 “ he still persists in his said contempt, and refuses
 “ to appear to and answer the Plaintiff’s bill, and
 “ the said commission of sequestration issued
 “ against the said Count S.: An affidavit of the
 “ service of the said subpœna for the said Count
 “ to appear to and answer the Plaintiff’s said bill;
 “ A translation of an exhibit marked T. No. 2, pur-
 “ porting to be a true translation of the said ante-
 “ nuptial contract between the said Defendant
 “ and the Plaintiff, dated, &c.; A translation of
 “ an exhibit, marked T. No. 3. purporting to be a
 “ true copy of the said sentence of the Court of
 “ Holland, for confirming the said agreement of
 “ separation, &c.; A translation of an exhibit,
 “ marked T. No. 4, purporting to be a true trans-
 “ lation of the Plaintiff’s said petition to the Court
 “ of Holland, and the Order of the said Court,
 “ dated, &c. being now produced and read, &c.
 “ &c. His Lordship, as between the Plaintiff and
 “ the Defendants, the S. S. Company, doth De-
 “ clare, that the said O. S. S. Annuities in question
 “ in this cause, ought to be considered as part of
 “ the personal estate of the Plaintiff, settled by
 “ her said marriage agreement, dated at the
 “ Hague the 28th day of December, 1742, to her
 “ separate use, free from the intermeddling of the
 “ Defendant the Count de S. her husband, and
 doth

VANESSEN
 VETSUS
 E. I. COMPANY,
 Feb. 24, 1749-50
 [*174]

[175]

VANESSEN
versus
E. I. COMPANY,
Feb. 24, 1749-50

“ doth order and decree, that the said Defendants,
“ the S. S. Company, do pay to the Plaintiff, or
“ such person or persons as she shall appoint, the
“ dividends that have accrued, or shall accrue,
“ due on the said O. S. S. Annuities; and permit
“ the said O. S. S. Annuities to be transferred by
“ her, or such person as she shall authorize for
“ that purpose, at her will and pleasure,” &c.
Reg. Lib.

VOL. I.

Page 396.

ASTON versus ASTON, Feb. 26, 1749-50.

(*Reg. Lib.* 1748. A. fol. 433.)

NOTES AND OBSERVATIONS.

Jointress having given leave to the next in remainder for life, without impeachment, &c. to cut timber, the remainder man in tail having acquiesced and encouraged his doing so, the latter was restrained by perpetual injunction from bringing action of waste against the jointress.

Wind-falls of timber, and other casualties, to whom the

[176]

pro-

NOTWITHSTANDING what Lord *Hardwicke* is reported to say p. 396, as to there being “ no judicial determination unto whom timber blown down, or cut by a stranger, would belong,” Lord *Talbot* had expressed his decided opinion upon the point in coincidence with that of his Lordship, as stated in the same page; adding, “ that it was so decreed upon occasion of the great windfall of timber on the *Cavendish* estate.” Vide *Bewick v. Whitfield*, 2 P. W. 241; and 3 P. Will. 267, 268. See, as to the case of *Bewick v. Whitfield*, note (1) to Mr. *Cox's* fifth edition, 3 P. W. 268; from whence it appears, that the Reporter had mistaken some very material circumstances of it.

Where the tenant for life has also in himself the next existent estate of inheritance, subject to intermediate contingent remainders, he shall not take advantage of his own wrong in cutting down timber;

timber; but the Court will preserve it for the benefit of the contingent remainder-men. *Williams v. D. of Bolton*, cited 3 *P. W.* 268, note.

ASTON
versus
ASTON,
Feb. 26, 1749-50

So, likewise, whether timber is cut down by a combination between the tenant for life and the person who has the next vested estate of inheritance. See 3 *Wood*, 400; 3 *Atk.* 210, 211; *et vide Garth v. Cotton*, 1 *Ves.* 524, 546, &c.; and in *Stansfield v. Habergham*, 10 *Ves.* 278, 279.

property belongs. Tenants for life, Remainder-men, &c.

COCKING *versus* PRATT, March 7, 1749-50.

(*Reg. Lib.* 1748. *A.* fol. 287.)

VOL. I.

Page 400.

NOTES AND OBSERVATIONS.

(1) The bill (*inter alia*) alleged, that the Defendant, who, as administratrix, ought to have accounted with her daughter for two-thirds of the intestate's effects, concealed the amount thereof from her, and gave her no account of several large sums out on mortgage, &c. to the amount of 3000*l.*; and that such part of the effects as was valued by the Defendant was greatly undervalued; and that the Defendant, pretending great kindness for her daughter, assured her she would get in the personal estate, and make her full satisfaction for her full share; and some time after acquainted her that, in order the better to secure to her her two-thirds of the personal estate; and to put it out of her own power to deprive her thereof, she would enter into an agreement with her for that purpose: and that about three months after the daughter's attaining 21, the Defendant

Relief against agreement made under a misconception of right.

Agreement as to distribution of personal estate set aside, although ratified; the value appearing much greater than was known to the Plaintiff at the time.

[177]

procured

COCKING
versus
PRATT,
Mar. 7, 1749-50.

procured articles to be drawn, and two parts thereof to be engrossed, without her daughter's perusal or examination; whereby the Defendant covenanted, that she would within one month after the date thereof, pay, or cause to be paid, to her daughter, the sum of 1000*l.* to her own use and disposal; and would, within one month then next, or so soon after as good security could be found, with her daughter's approbation, place out and settle a further sum of 1000*l.* in the names of *T. S.* and *B. P.* upon trust, as to the interest thereof, for her own use for life; and as to the principal, &c. after her own death, in trust, for her daughter, her executors, &c. to be disposed of as she should appoint; and that she, the Defendant, would release to her daughter her right of dower, or thirds, out of certain copyhold estates: and that the daughter thereby covenanted that she would accept of the above considerations in full satisfaction and recompence of her right of two-thirds of the personal estate, &c; and would release to her mother all further claim therefrom. One of which articles, so engrossed and produced, was executed by the daughter, who wholly depended upon, and trusted in, her mother's pretended kindness and affection, &c. &c. without knowing the true value of her father's personal estate, or having any account thereof, &c. That the Defendant not only refused to pay her daughter the 1000*l.* in money until after her intermarriage, but had refused to settle the further stipulated sum of 1000*l.* and to release her dower; and had refused to discover the particulars of the personal estate, &c. That the Defendant, after the execution of the articles, carried it very unkindly to her daughter,

daughter, and married one *Pratt*, and left her daughter to shift for herself, and refused to pay any money for her subsistence. That soon after the Plaintiff's marriage with the daughter, they both applied to the Defendant for an inventory and account, &c. that they might be satisfied for two-thirds of the clear amount. That the Defendant afterwards paid to the Plaintiff and his wife 1000*l.* and promised to give them an inventory and account, &c. and pay them two-thirds of the real value thereof. That the Plaintiff, since his wife's death, likewise had applied for such inventory and account, and to be paid two-thirds, &c. &c. The Plaintiff then charged, that there was a recital in the Defendant's marriage articles with *Pratt*, that she, the Defendant, was entitled in her own right, to a personal estate to the amount of 1000*l.* and upwards, over and above the part or share of her daughter, being two-thirds of his personal estate, he dying intestate; whereby it was evident, that the personal estate amounted to 3000*l.* at the least; whereas, by the articles, only 1000*l.* was allowed to the Plaintiff's wife in present, and the Defendant had taken to herself the interest of the 1000*l.* mentioned in the second instance, during her life, which ought to have been immediately paid to the Plaintiff's wife, supposing the intestate had died worth only 3000*l.*; and that as to the release of dower, the yearly rent of all the copyhold premises was not 30*l.*; and that she had not even performed that part of the articles.

COCKING
versus
PRATT,
Mar. 7, 1749-50.

The Defendant, by her plea, (which had been allowed on argument), as to such part of the bill as sought any discovery of the intestate's personal estate, [179]
Plea of inventory delivered and approved, and

COCKING
versus
PRATT,
Mar. 7, 1749-50.

and of agree-
ment thereon
founded, with-
out fraud, &c.

estate, or to set aside the articles, insisted, that she caused an inventory and an appraisement to be taken of the intestate's estate and effects, which appraisers were chosen by the Plaintiff's wife; and that afterwards the Defendant delivered such inventory to her, who kept the same till her marriage; and that such inventory was a full and true inventory; and that the Plaintiff's wife carefully examined the same; and, being thoroughly apprized of the value of her late father's personal estate, she executed the agreement mentioned in the bill. That her daughter fairly and voluntarily executed the articles, without any fraud or collusion of the Defendant; and that such articles were drawn by her daughter's desire, and that she was fully apprized thereof, and held the same, or the draft thereof, in her custody a month before the execution thereof, and was not any ways imposed upon therein. That after the Plaintiff's marriage she paid them 1000*l.* in pursuance of the articles. That the Plaintiff, having accepted a performance of the agreement, ought not to be at liberty to controvert it; and that she was willing to perform the other parts of the agreement which were to be performed by her; and that the provision made by the articles for the Plaintiff's wife were more beneficial to her, and amounted to more than her two-thirds of the personal estate would have done. That having made the agreement, she did not keep any account of the personal estate, and she apprehended the Plaintiff was not entitled thereto. The Defendant put in an answer likewise relative to the copyholds, &c. She afterwards put in a second answer, setting forth the inventory and appraisement; and an account

[180]

count of her disbursements, by way of schedule. And she admitted having put out to interest, unknown to her husband, a sum of 200*l.*; and she said, that the Plaintiff's wife was privy to such transaction.

COOKING
versus
PRATT,
Mar. 7, 1749-50.

The Decree was as stated in the Report. *Reg. Lib.*

LONGUET versus SCAWEN,

March 10, 1749-50.

(*Reg. Lib.* 1749. B. fol. 130.)

VOL. I.

Page 402.

NOTES AND OBSERVATIONS.

THE bill was filed by the testator's surviving executor, &c. against the surviving trustee of the two terms of years, and the testator's heirs at law.

The Decree declared, that the annuities were redeemable, and ought, in a Court of Equity, to be considered as part of the testator's personal estate, &c.

Coventry v. Coventry, stated page 404, is also in 2 *Atk.* 366. "The facts of this case are very fairly stated in *Atkins*, but the judgment is probably better given in Mr. *Joddrell's* notes." Per Lord *Eldon*, C. 10 *Ves.* 616.

Grant of annuities during life of the grantee, in satisfaction and discharge of a debt, the grantor not to be liable personally, but reserving a power to re-purchase and redeem the annuities. Held part of the personal estate of the grantee, and similar to the case of Welsh mortgages.

[181]

VOL. I.

Page 407.

BROWN *versus* PRING, March 12, 1749-50.

(Reg. Lib. 1749. A. fol. 423.)

NOTES AND OBSERVATIONS.

Undue influence and misrepresentation.—(1) THIS point appears only in *R. L.* Solicitor in a cause charged with interest on money directed to be laid out for an infant's benefit, notwithstanding a deed from the grandmother giving other monies in trust for the infant, and directing that he should not be so chargeable. Stated accounts set aside; the items being very gross, and the settlement obtained from a person just come of age under a misrepresentation. Bond obtained from the infant's grandmother for the amount of bill of fees and disbursements, directed to stand as a security for monies justly due on account, and the bill ordered to be taxed (1).

Page 409.

WRIGHT *versus* WRIGHT,
March 15, 1749-50.

S. C. 1 Ves. 326.

(1)

(Reg. Lib. 1749. B. fol. 273.)

NOTES AND OBSERVATIONS.

Devise of land on contingency to Robert "or his heirs." Robert, before the contingency happens, conveys "all his right, title, claim, and demand" (2) therein, by deed, to his younger son, and his heirs, as a provision, and dies.

(1) THIS is the same case which is entered anonymously in 1 *Ves.* 326; as to which, vide the note, *antea*, 158; from whence it appears, that the Plaintiff, having obtained the Decree now reversed, which he was doubtful of supporting, had enrolled it too rapidly.

(2) The bill was filed by the heir of *Robert*, against *George*, the younger son, unto whom the conveyance had been made.

(3) The cause came before the Court by way of appeal, the Master of the Rolls having decreed in favour of the Plaintiff. The Decree was reversed,

versed, and the bill dismissed with costs. *Reg. Lib.* Vide 1 *Ves.* 326, et antea 158.

WRIGHT
versus
WRIGHT,
Mar. 15, 1749-50

After the words of the will stated in Mr. *Vesey's* Report, p. 409, limiting the interest of the daughters marrying without consent to a lifeestate, the will proceeded thus: "*And then, or if either of them should die, his son Robert should take it,*" &c. (as in the Report). He then devised a rent charge of 20*l.* per annum for life, to such daughter as should marry without consent as aforesaid. It appears also that the testator made a codicil to his will, whereby, "in order that his two maiden daughters *S.* and *M.* might have something to dispose of in case they or either of them should die unmarried, he gave to either of them that should first die unmarried and their heirs and assigns, his meadow in *D.* to be disposed of as she should think fit; and if they both died unmarried, he gave to which of them should die last, his meadow in *I. H.* &c. to her and her heirs." *Reg. Lib.*

dies. The contingency happening, Robert's heir (3) cannot claim this against his father's act. "Or" construed "and."

The petition of appeal stated (*inter alia*), that *Robert* had provided for the Plaintiff, his eldest son, by conveying to him, on his marriage, all his real estate, of which he, *Robert*, was tenant for life, reserving only a small annuity thereout for his life; and that the Defendant, who was his only younger son, was unprovided for, except by the conveyance in question. The main *gravamen* insisted upon by that Petition was, "for that the premises in dispute, under the contingencies in the will of the testator, were by *Robert* conveyed to the Defendant, his younger son, as a provision for him," &c. &c. *R. L.*

[182]

WRIGHT *Hobson v. Trevor*, cit. p. 410, was decided by
 versus Lord Macclesfield, 2 P.W. 191.
 WRIGHT, *Beckley v. Newland*, cit. ibid. is in 2. P. W.
 Mar. 15, 1749-50. 182.
Harvey v. Harvey, cit. ibid, is in Barn. Ch.
 Rep. 109.

VOL. I.
 Page 413.

ATTORNEY GENERAL *versus* SCOTT,
 February 23, 1749-50.

NOTES AND OBSERVATIONS.

Presentation to a living. The case cited of *Attorney General v. Foley*, page 418, as in *Dom. Proc.* is reported 7 Bro. P. C. 249, octavo edit.
 Twenty-five trustees were to meet, and to present and elect a clergyman—one dies ; *Attorney General v. Davey*, cited p. 419, is in 2 Atk. 212.
 the rest are equally divided ; half being in favour of A. the rest voting for B. Upon the death of the supporters of the latter, the friends of A. meet and sign a presentation for him. This is void at Law, and cannot be supported in Equity.
 There should have been a distinct notice for the meeting of all. A direction that the trustees should meet for such purpose "within four months" from the death of an incumbent, does not prevent their meeting after that time.
 Trustees cannot make proxies to vote in such a personal trust as the above ; though if a choice were regularly made at a proper meeting, they might for the mere purpose of signing the presentation.
 Disusage evidence of abandonment by consent, as to part of a constitution, which arose from consent.

AVELYN *versus* WARD, March 19, 1749-50.

(Reg. Lib. 1749. A. fol. 286.)

[183]
VOL. I.
Page 420.

NOTES AND OBSERVATIONS.

(1) THE third edition refers to 3 *Lev.* 125, 2 *Str.* 1092. *Fearne* 400. *Doug.* 63. 1 *Wils.* 107. 3 *Burr.* 1624. *Forr.* 44. 3 *Atk.* 315.

Et vide *Thellusson v. Woodford*, 4 *Ves.* 227; and Mr. *Hargrave's* argument.

Jones v. Westcomb, cited page 421, is in *Prec.* Ch. 316, and 1 *Eq. Ab.* 255. As to *Andrews v. Fulham*, cit. *ibid.* vide 1 *Wils.* 107. 3 *Burr.* 1624. *Fonnereau v. Fonnereau*, cit. *ibid.* is in 3 *Atk.* 315. As to *Gulliver v. Wicket*, cit. *ibid.* vide 1 *Wils.* 105. *Townsend v. Ashe*, cit. p. 422, in in 3 *Atk.* 336.

It should be observed, that the case of *Davis v. Norton*, 2 *P. W.* commented on in note to the third edit. of Mr. *Vesey's Reports* (the Irish edition) p. 422, was said by Lord *Thurlow* C. to be misconceived by the Reporter from beginning to end, and was no authority for any one point; and also, that all the remainders were vested, and should have taken place. See 3 *Bro.* 397.

(2) One of the bequests in the principal case was of "2000*l.* in the stock or funds, commonly "called S. S. Annuities, to trustees, in trust, to "pay the produce thereof to the use of the De- "fendant *F. W.* for life; and after her decease to "retain 1000*l.* part thereof, in trust, for his niece, "the Plaintiff *F. A.* and to pay the dividends

Devisee, on con-
dition that the
land should go
over to another
if he did not
give a release in
three months
after testator's
death; dying in
the testator's
life-time, the
devisee over
shall take in-
stead of the heir
at law. This
being a condi-
tional limita-
tion, and not a
strict condition.

(1)

[184]

Specific legacies
of stock, et c
contra. (2)

AVELYN
versus
WARD,
Mar. 19, 1749-50

" thereof to her during her coverture; and after
" such coverture 'to transfer' to her the 1000*l*.
" if living; and if dead, as she should appoint,
" &c. The remaining 1000*l*. part of the said
" 2000*l*. the testator gave, after the death of his
" sister, to others."

Another bequest was " 1200*l* of the stock,
" called *S. S. Annuity Stock*, in trust, for the sole
" use of the Plaintiff *F. A.*" subject to certain
trusts and appointment, before-mentioned in his
will as to other bequests. *R. L.*

Ashton v. Ashton, cit. page 404, 405, is in *Ca. T. Talb.* 152, and 3 *P. W.* 384.

Partridge v. Partridge, cit. p. 426, is in *Ca. T. Talb.* 226.

[185]
VOL. I.

Page 426.

PLUMMER versus MAY, March 22, 1749-50.

(*Reg. Lib.* 1749. *B. fol.* 250.)

NOTES AND OBSERVATIONS.

A mere witness cannot be made a Defendant for discovery of what he is examinable to; unless he is interested. If the bill charges he is interested,

the Defendant must plead and support it by an answer denying that allegation; and cannot demur. (1)

A party cannot examine his own witness upon a *voir dire*. (2)

(1) SEE, however, *Fenton v. Hughes*, 7 *Ves.* 287; *et per* Lord *Eldon* C. in that case, *ibid.* 289, 290.

There is no further entry in *Reg. Lib.* than that the demurrer was over-ruled.

(2) See 7 *Ves.* 290.

STAPLETON *versus* CONWAY,
March 30, 1750.

VOL. I.
Page 427.

(Reg. Lib. 1749. A. fol. 584.)

NOTES AND OBSERVATIONS.

(1) As to the first point, the Court declared; "that by the true construction of the trust of the term of three hundred years, the said sum of 2000*l.* ought to carry interest only after the rate of 5*l.* per cent. per annum."

Upon the general question of West India Interest, see *Raymond v. Brodbelt*, 5 *Ves.* 199, and *Bourke v. Ricketts*, 10 *Ves.* 330, 331, &c.

The annuity mentioned at the end of the Report, was of 500*l.* per annum, payable quarterly, and was granted by a deed, in which it was declared to be in lieu of interest, upon a principal sum of 11,000*l.* thereby secured.

There were other questions in the cause; one of them was, whether the above-mentioned sum of 2000*l.* which was charged in favour of Sir William, upon the inheritance of Lady Frances Stapleton, his mother, should not be deemed as part of a sum of 3000*l.* given by her will to Sir William's grand-children. Sir William had died.

Lady Frances, by her will, declared "her intention was, that the 3000*l.* [before] given to her grand-children, the younger children of Sir William, should be accounted for payment of the sum of 2000*l.* charged on the plantation at Nevis, and payable to her said grand-children."

Money charged on an estate in Nevis held to carry only English interest. (1) This sum, which was charged in favour of W. held to be included in the bequest of a larger sum to W.'s younger children, the testatrix suppos-

[186]
ing that they were entitled to the charge, although it was not the case, and decreed that no more should be raised than the sum bequeathed. Plate passes under a bequest of "household goods."

The

STAPLETON
versus
CONWAY,
 March 30, 1750. The Plaintiffs, who were Lady *Frances's* co-heirs, "insisted, that in case the 2000*l.* payable to Sir *William* at 21 years, chargeable on the *Nevis* Plantation (the inheritance of Lady *Frances*), were taken to be part of Sir *William's* personal estate; then the 3000*l.* given by the will of Lady *Frances* to the younger children of Sir *William*, ought to sink, and not be raised; or, in case it were, that part ought to be paid to the Plaintiffs.

The Decree declared, that "it appeared to have been the intention of Lady *Frances Stapleton*, "in her will, to comprehend and include the "2000*l.* and interest, in the legacy of 3000*l.* and "interest, so given; and that no more than the "said 3000*l.* and interest, should be answered out "of her estate;" and therefore ordered, that "so "much as the Master should find due for the "2000*l.* and interest, should be deducted out of "so much as should be found due for the 3000*l.* "and interest, and paid to Sir *W.'s* personal representative; and that the residue of the 3000*l.* "and interest should be divided between the surviving younger children of Sir *William*, and "the representative of another of them who had "died."

[187]

Another question was, whether plate passed under a bequest of *household goods* and furniture, which should be at the testatrix's house, at *A.* at her death:

And the Court declared, "that such plate "passed as was commonly used in the testatrix's "dwelling-house at *A.* at the time of her death." *Reg. Lib. Vide 2 Roper on Legacies, 239.*

The Editor has searched the Registrar's books
 for

for the space of ten years, in hopes of finding the question of interest upon the arrears of the annuity decided, but without success. He found nevertheless, that upon the cause coming on for farther directions, the Master was directed to revise his Report. *Reg. Lib. 1752, B. fol. 50.*

STAPLETON
versus
CONWAY,
March 30, 1750.

It seems, however, that the further agitation of this question must have been rendered unnecessary; since the Editor finds that certain variations were made in the original Decree, in consequence of a Petition of Re-hearing relative (*inter alia*) to the application of the above-mentioned arrears; after which there appears the following clause; *viz.* "But the Defendants are to pay to the Plaintiffs the sum of 20*l.* in satisfaction of their costs of so much of the proceedings before the Master as are become useless by the directions herein-before given." *Reg. Lib. 1752, B. fol. 129, 131.*

[188]

As to there being no interest given upon arrears of annuities, see *D. Bedford v. Coke*, 2 *Ves.* 117, *et postea*, 298, and the notes on *Morris v. Dillingham*, 2 *Ves.* 170, *postea* (320); also 2 *Ves.* jun. 163, 164, 166, 167.

VERNEY versus VERNEY, April 2, 1750.

(*Reg. Lib. 1749. B. fol. 262.*)

VOL. I.

Page 428.

NOTES AND OBSERVATIONS.

S. C. Amb. 88.

THIS case was determined on consent. Vide *Amb.* 48; and 9 *Vesey*, 557.

The rule determined by Lord *Hardwicke* as

Leasehold interest.—Contribution and apportionment for to renewal. (1)

VERNEY
versus
VERNEY,
April 2, 1750.

Revocation pro
tanto. (2)

No contribu-
tion from an
annuitant for
life out of lease-
hold renewable
interests.

[189]
Revocation (2).

Revocation, by a
codicil directing
a

to tenant for life contributing one-third of the charges on a renewal, *does not now prevail*.

Where no inference is to be collected from a will under which the successive bequests are taken, an apportionment is to be made *according to the benefit actually taken by the parties*; the tenant for life keeping down the interest. Vide *Nightingale v. Lawson*, 1 Bro. 440. *Stone v. Theed*, 2 Bro. 448. *White v. White*, 4 Ves: 24, 33. Affirmed on Appeal by Lord Eldon C. 9 Ves. 554, quod vide. Sed vide *ibid*. 560.

Notwithstanding the above, it may be observed, that in the case of an annuity for life given out of a leasehold renewal interest, *the annuitant is not bound to contribute*. Vide *Maxwell v. Ashe*, 1 Bro. 444 (note); and 7 Ves. 184; and *Moody v. Matthews*, 7 Ves. 174.

(2) As to the point of revocation; the estate was devised by the will as follows: "I give my estate at O. chargeable, nevertheless, with my debts, to my dear wife for her life; remainder to my son, in tail general;" with other remainders over. But the testator, *by a codicil*, devised "his rectory, &c. and all his lands, tenements, &c. which he held in fee simple in Great Britain, to H. his heirs and assigns, upon trust, by mortgage or sale thereof, to raise such money as should be necessary for the more easy and effectual payment of his debts."

It appears that a question was made at the hearing of this cause, whether the codicil did not amount in Equity to a revocation of the devise in the will, as to the estate at O.

The Court declared, "that the codicil was in Equity a revocation of the devise, so far only as to

“to enable *H.* the trustee, to mortgage or sell the
“same to raise money for the more easy and
“effectual payment of the testator’s debts; and
“that the surplus thereof passed by the devise in
“the will.” *Reg. Lib. ubi supra.*

VERNEY
versus
VERNEY,
April 2, 1750.

a sale or mort-
gage to pay
debts, merely
pro tanto.

EARL OF PORTSMOUTH *versus* LORD
EFFINGHAM, May 9, 1750.

VOI. I.
Page 430.

(*Reg. Lib.* 1749. *A. fol.* 668.)

NOTES AND OBSERVATIONS.

SEE 1 *Ves.* 30.

As to *Hopkins v. Hopkins*, cit. p. 431, vide 1
Ves. 268, 269, and 1 *Atk.* 581.

Vide 2 *Stra.*
1267.
Bill of review
on new matter.

(1) See upon this subject generally, Mr. *Beames’s*
valuable work upon the Orders in Chancery, pp.
1, 2, &c.

(1)
Questions as to
legal and equi-
[190]

Chapman v. Blisset, cit. *ibid.* is in *Forr.* 145.

Norris v. Le Neve, cit. p. 432, is in 3 *Atk.* 26,
39, and 2 *Bro. P. C.* 73, octavo edit.

table recoveries,
and trustees to
support contin-
gent remain-
ders.

Casburn v. English, cit. p. 433, is in 1 *Atk.*
603.

Hearle v. Greenbank, cit. *ibid.* is in 1 *Ves.*
298.

See towards the top of p. 434, as to the inser-
tion of trustees to preserve contingent remainders.
It is their duty never to permit a tenant for life or
years to bring forward a remainder to himself or
another, by the destruction of that estate. Vide
per Lord *Eldon* C. 10 *Ves.* 278; et vide *Garth v.*
Cotton, 1 *Ves.* 524, 546.

Duty of trustees
to preserve, &c.

See

E. of PORTS-
MOUTH
versus

L. EFFINGHAM,
May 9, 1750.

Bill of review
on new matter.

See page 435. A bill of review, or a supplemental bill in nature of it, to reverse a Decree upon the discovery of new matter, must have the previous leave of the Court; and this will not be granted but upon affidavit that the new matter could not be produced or used, at the time when the Decree was made.

Vide *Mitf.* 78; and *Cole v. Gibson*, 1 *Ves.* 504, *et postea*.

[191]
VOL. I.

Page 437.

POTTER versus POTTER, May 17, 1750.

(*Reg. Lib.* 1749. *B. fol.* 547.)

Vide S.C. 3 Atk.
719, and Amb.
98, upon other
points.

Lands agreed to
be purchased,
pass by general
words in a will
such as "or else-
where." Repub-
lication by a
codicil. (1)

NOTES AND OBSERVATIONS.

- (1) VIDE *Gibson v. Lord Montfort*, 1 *Ves.* 485.
2 *Wood*, 366; and *Piggot v. Waller*, 7 *Ves.* 98.
Martin v. Savage, cit. p. 440, is in *Barn. Ch.*
Rep. 189.

Page 443.

Rolls.

SANSUM versus BRAGGINGTON.

May 15 and 31, 1750.

(*Reg. Lib.* 1749. *B. fol.* 373.)

NOTES AND OBSERVATIONS.

A ship pledged
abroad by the
master for ex-
pences, &c. well
hypothecated,
and

- (1) As to the liability of the owners, &c. to de-
mands for repairs of the ship *at home*, &c. where *no*
hypothecation, vide *Buxton v. Snee*, 1 *Ves.* 154,
155, 156, *et antea*, 84.

In

In the principal case, *Braggington* and *Pitman* were the sole owners, and *Pitman* was the Master.

SANSUM
versus
BRAGGINGTON,
May 15 and 31,
1750.

The vessel was repaired, refitted, and supplied by the Plaintiff at Jamaica for her homeward-bound voyage: in the prosecution of which she was taken by the French.

and the port-
owners liable
each for the
whole demand.
(1)
Del credere.

The bill stated the circumstances, and the deed of hypothecation, alleging, that by the capture and condemnation, the hypothecation of the ship became, as such, frustrated; and that the Plaintiff, being deprived of that additional security, was left wholly to depend on the Defendant *B.* and *Pitman*, for re-payment. It then *alleged*, that *B.* and *P.* had fully insured the ship and freight, and they had afterwards recovered the full amount from the underwriters: and it stated, that *Pitman* had died on the coast of Guinea. His representative was brought before the Court.

[192]

The Defendant *B.* admitted he had insured the ship and freight, and had received the amount from the assurers; but stated it as 2000*l.* short of his interest in the ship, cargo, and freight. He stated, that he looked upon himself as not liable to pay the Plaintiff's demands, since he had reason to believe, from a letter of *Pitman's*, that the Plaintiff had an allowance made him of 20*l. per cent.* or more, on money by him advanced, in case he did advance any, for the repairs, &c.: which he hoped to prove was added to the monies so advanced by him, and actually made the consideration of the instrument of hypothecation: and he insisted, that according to the custom of merchants, allowance after the rate of 20*l. per cent.* was to be understood, and taken, to be made and given

SANSUM
versus
BRAGGINGTON,
May 16 and 31,
1750.

given with intent that the party to whom such allowance is made should take the risk of the ship, freight, &c. so hypothecated, upon himself, and become, and be in the nature of, an insurer to himself for ship, freight, &c. so hypothecated; to the amount of the sum advanced.

[193]

The Court declared, " that the demand of the
" Plaintiff for the money advanced or laid out by
" him in the refitting or furnishing with provisions
" or stores of the said ship, ought to be established
" against the Defendants *Braggington* and *N.*
" [*Pitman's* administratrix], according to the pro-
" portions of their interest in the ship; (that is to
" say) as to the Defendant *N.* as administratrix of
" *J. P.* for one-eighth out of the assets of her in-
" testate; and as to the Defendant *B.* for the
" other seven-eighths." And it was referred to the
Master " to reduce the Plaintiff's demand from
" Jamaica currency to sterling money, and to
" charge the Defendants *B.* and *N.* with their pro-
" portions thereof; and the Defendant *B.* was to
" answer what the Master should certify was his
" proportion thereof: and the Defendant *N.* was
" to answer what, &c. out of her intestate's assets,
" as a simple contract debt, in a course of adminis-
" tration; and if she did not admit assets she was
" to come to an account. But the Master was to
" enquire whether any thing, and how much, was
" due from the Plaintiff for freight of any goods
" loaden by him, or on his account, or otherwise,
" on the outward-bound voyage; and if he should
" find any thing so due, he was to deduct the same
" proportionably out of each part of the Plaintiff's
" demand against the respective Defendants; and
" in case the Plaintiff should not be able to procure
" satisfaction

"satisfaction for the one-eighth part of his debt,
"out of the assets of the intestate; then the De-
"fendant B.* was to make him satisfaction of the
"same, or so much thereof as he should not procure
"satisfaction for." Reg. Lib.

SANSUM
versus
BRAGGINGTON,
May 15 and 31,
1750.

PENN versus LORD BALTIMORE,
May 15, 1750.

(Reg. Lib. 1749. B. fol. 439.)

[194]
VOL. I.
Page 444.

NOTES AND OBSERVATIONS.

(1) SEE in *Barclay v. Russell*, 3 *Ves.* 431, &c. and *Nabob of Arcot v. E. I. Company*, 1 *Ves.* jun. 371; and 2 *Ves.* jun. 56.

Specific performance of articles executed in England concerning boundaries of lands abroad.

The Court will relieve as to the settlement of disputes, although it may afterwards appear that one of the parties had no title, if no fraud.

Stapilton v. Stapilton, 1 *Atk.* 2. *Frank v. Frank*, 1 *Ch. Ca.* 85. *Cann v. Cann*, 1 *P. W.* 723, 727.

(1)
Agreements to settle disputes.

Pullen v. Ready, 2 *Atk.* 592. *Goilman v. Battinson*, 1 *Vern.* 48. *Cory v. Cory*, 1 *Ves.* 19. See 2 *Ves.* 284.

(2) See page 454.

Process on a Decree for possession of land.

"After service of writ of execution of a Decree for delivery up of possession of lands, the (2)

* The law seems now settled, (contrary to this part of the decision, and to that of *Doddington v. Hallet*, 1 *Ves.* 497: so that part-owners are to be considered as partners: or answerable for more than their respective shares and interests. See the note on *Buxton v. Snee*, antea 84, and on *Doddington v. Hallet*, postea 205.

" Court

PENN
versus
 L. BALTIMORE,
 May 15, 1750.

“ Court will grant an injunction on a motion of
 “ course ; and the writ of assistance to the sheriff
 “ is founded on it.” In *Huguenin v. Bazely*, 15
Ves. 180.

The directions in the principal case being particular, and as they may be possibly useful, at some time, to the Profession, the author has subjoined them.

[195]

The Court declared, “ that the articles of agreement were valid and obligatory upon the parties who executed the same, or the indorsements thereupon, and their heirs and assigns ; and that the said articles ought to be specifically executed and performed by and between the said parties respectively ; notwithstanding that the several periods of time thereby limited for doing and performing divers matters and things therein-mentioned and agreed upon were elapsed ; but that the said articles did not bind or prejudice any prerogative, property, title, or interest of the crown, in or to the territories, districts, or tracts of land, comprised in the said articles, or any part thereof ; nor any estate, right, interest, or possession of any of the planters, proprietors, tenants, or occupiers of any lands or tenements within the said territories, districts, or tracts of, in, or to any lands, tenements, or hereditaments lying within the same, which the parties aforesaid had not a right or power, by virtue of the respective charters or grants under which they claimed, to bind or conclude : and it was therefore decreed, that the said articles, and the several matters and things therein contained, should be performed and carried into execution by and between the said parties, and every of them ; and to that end, *that the Plaintiffs*

Plaintiffs T. P. and R. P. the father, in their own right, and as standing in the place of J. P. deceased; and the Defendant, the Lord B. should respectively, before the end of three calendar months from that day, execute, under their hands and seals, two several proper instruments, appointing and authorizing proper persons, not more than seven on each side, with full powers to the said seven persons respectively, or any three or more of them, for the actual running, marking, and laying out the part of a circle, and the several lines in the said articles mentioned: and such commissioners were to give due notice to each other, and to fix and agree upon a time or times to begin and proceed in the running, marking, and laying out the same."

PENN
versus
L. BALTIMORE,
May 15, 1750.

[196]

And it was further ordered, " that the same should be begun, at the furthest, some time in the month of November then next, and be proceeded in according to the said articles; and that the said lines should be marked out by visible stones, posts, trees, pillars, buildings, land marks, or other certain boundaries, which might remain and continue; and that such boundaries should be marked on one side with the arms of the Defendant the Lord B.; and on the other side, with the arms of the Plaintiffs the Penns; and that such lines should be completely so run, marked, and laid out, on or before the last day of April 1752; and when so done, that a true and exact plan and survey thereof, with the best, and most exact, and certain description that could be given of the same, should be made up, signed, and sealed by the commissioners on both sides, and by their principals, and be entered in all the public

PENN
versus
L. BALTIMORE,
May 15, 1750.

[197]

public offices in the provinces of Maryland and Pennsylvania, and the three lower counties of Newcastle, Kent, and Sussex ; and that a true copy of such respective instruments for appointing commissioners, when prepared, should be delivered by the solicitor of the one party, to the solicitor of the other party ; and in case the parties should differ about such instruments, or either of them, the Master was to settle the same." "And two questions in particular having been raised in America by the commissioners formerly appointed by the Defendant Lord *B.* and being then made in the cause ; *viz.* where the centre of the circle, agreed by the said articles to be drawn about the town of Newcastle therein-mentioned ought to be fixed ; and whether the said circle ought to be of a radius or semi-diameter of twelve miles, or only of a periphery of twelve miles ; and a third question being also made in the cause ; *viz.* at what place the Cape, called in the said articles Cape Hinlopen, is situated ; his Lordship declared he was of opinion, that according to the true intent and construction of the said articles, the centre of the said circle ought to be fixed in the middle of the town of Newcastle, as near as the same could be computed ; and that the said circle ought to be of a radius or semi-diameter of twelve miles ; and that Cape Hinlopen ought to be deemed and taken to be situated where the same is laid down and described in the map or plan annexed to the said articles to be situated ; and therefore his lordship further decreed, that the said articles should be carried into execution accordingly ; and that after the said limits and boundaries should be so set out and ascertained by the commissioners,

sioners, the Plaintiffs *T. P.* and *R. P.* the father, in their own right, and as standing in the place of *J. P.* deceased, and the Defendant Lord *B.* should respectively release and convey to each other, and their heirs, their respective rights, titles, interests, powers, prerogatives, claims, demands, and pretensions, in or to the respective territories, districts, and lands severally allotted to them, according to the tenth article contained in the said articles of agreement, at the costs and charges of the person or persons to whom such release and conveyance should be made; and the Master was to settle such releases, &c. if the parties differed, &c.; and all proper parties were to join, &c. But the Decree was to be without prejudice to any prerogative, power, property, title, or interest of his Majesty, his heirs and successors, in or to the said territories, districts, or tracts of land, or any part thereof; and also to any estate, right, interest, or possession of any of the planters, &c. [as before.] And in case his Majesty, his heirs or successors, should insist upon any power, title, or right whatsoever, either on behalf of his Majesty, his heirs or successors, or of any of his or their subjects, residing in, or being possessed of, or interested in, any lands, tenements, or hereditaments, lying within any of the said territories, districts, or tracts of land, so as to hinder, obstruct, or interrupt the effectual execution or performance of the said articles, or any part thereof; then, and in every such case, any of the parties were to be at liberty to apply, from time to time," &c. And his Lordship reserved the consideration of any further or other directions to be given as between the Plaintiffs and the Defendant Lord *B.*

PENN
versus
L. BALTIMORE,
May 15, 1750.

[198]

PENN
versus
L. BALTIMORE,
May 16, 1750.

and the Defendants claiming under *W. B. Esq.* deceased, upon any such application. The Defendant Lord *B.* was directed to pay the Plaintiff his costs up to the hearing, as mentioned in the report; and further directions were reserved until the time limited by the Decree for performance of the articles should be expired, &c. *Reg. Lib. ubi supra, fol. 456, 457.*

[199]
VOL. I.
Page 456.

WEST versus SKIPP, May 16, 1750.

(*Reg. Lib. 1749. B. fol. 519.*)

NOTES AND OBSERVATIONS.

THE Master was also to enquire "whether the sum of 1111*l.* 19*s.* 11*d.* mentioned in the assignment made by *I. S.* officer of the customs, to *B. S.* and *M. H.* was advanced, or paid by the said *E. S.* and *H. M.* or either of them, or by the Defendants *R. H.* or *J. H.* and *John Sleor-gin*, or any of them? and whether the money so advanced, was really and truly the money of the said *E. S.* and *M. H.* or either of them, or belonging to the partners, or to the said *G. H.* and *R. H.* or either of them separately," &c.

Page 456.

BAKER versus PAINE, May 21, 1750.

NOTES AND OBSERVATIONS.

Agreement.
Admission of
parol

THE case referred to p. 457, as in Mich. 1746, is *Joynes v. Statham*, 3 *Atk.* 388. On which case see

see observations by Lord *Rosslyn* and Lord *Eldon*,
C. 4 *Bro.* 518, and 6 *Ves.* 325, note.

As to the points of law there noticed, vide also
in *Walker v. Walker*, 2 *Atk.* 100. *Woollam v.*
Hearn, 7 *Ves.* 211, 219, 220, &c. and *Legal v.*
Miller, 2 *Ves.* 199.

BAKER
versus
PAINE,
May 21, 1750.
parol evidence
where fraud or
surprise.

ROOK versus WORTH, May 23, 1750.

(*Reg. Lib.* 1749. *B. fol.* 611.)

[200]
VOL. I.
Page 460.

NOTES AND OBSERVATIONS.

(1) It was declared "that the house admitted
"in the pleadings of the cause to have been burnt
"down, being a copyhold estate in tail, and the
"tenant in tail dying during his infancy, the
"Plaintiffs and the Defendant *R. C.* as issue in
"tail, are entitled to have a reasonable proportion
"of the sum of 96*l.* (which was allotted and paid
"for such loss) paid to them in order to the re-
"building of the said copyhold house so burnt
"down; and that under the circumstances of the
"case, the sum of 80*l.* ought to be considered as
"such reasonable proportion." And decreed, that
Worth and his wife should pay the same, &c.
But in case *Worth* and his wife should give the
Plaintiffs any further trouble, the Plaintiffs were
to be at liberty to apply to the Court for their
costs. *Reg. Lib.*

(2) As to the interest of infant tenants in tail,
and questions arising thereon, vide *Ware v. Pol-*
hill, 11 *Ves. Jun.* 257, 274, &c. &c.

A sum of 96*l.*
paid to guardian
of an infant
tenant in tail
for rebuilding
a copyhold
tenement that
had been burnt
down, but which
had never been
so applied
during the in-
fant's life, held
to belong to the
succeeding
remainder-man
in tail, subject
to a deduction
of interest upon
a larger sum at
which the loss
was computed.

(1)
Such interest
held to belong
to the personal
representatives
as a compensa-
tion for the loss

**ROOK
versus
WORTH,**
May 23, 1750.

of the rents and
profits sustain-
ed by the in-
fant, who could
not alien. (2)
Questions as to
infant tenants
in tail.

[201]
VOL. I.

Page 462.

As to the Court's maintaining the real or personal estates of infants in *statu quo*, as mentioned in p. 461, vide 1 *Atk.* 480. *Witter v. Witter*, 3 *P. W.* 99, 100. 11 *Ves.* 257, 278; and the *Countess of Shrewsbury v. E. of Shrewsbury*, 1 *Ves.* Jun. 227.

GREEN versus RUTHERFORTH,
May 23, 1750, *et postea*.

(*Reg. Lib.* 1749. *A. fol.* 396.)

NOTES AND OBSERVATIONS.

Plea to
jurisdiction.

It appears from the Registrar's Book, that about a month after the over-ruling of the plea, as mentioned at the end of the report, p. 475, Dr. *R.* not only acquiesced in the opinion of the Court as to the plea: but having signified to the Plaintiff that he would not give him any further trouble in the cause, the Court, on his consent, ordered him forthwith to deliver up to the Master, &c. of *St. John's College* the presentation obtained by him from them, &c.; and ordered the said Master, &c. of *St. John's College* thereupon, forthwith to present the Plaintiff, &c. *Reg. Lib. ubi supra.*

Page 476.

ANONYMOUS, June 15, 1750.

NOTES AND OBSERVATIONS.

THIS motion is entered in the minute book as on the part of the "Dean of Durham."

AMSBURY

AMSBURY *versus* BROWN, June 16, 1750.

(Reg. Lib. 1749. A. fol. 591.)

NOTES AND OBSERVATIONS.

(1) *VIDE Kirkham v. Smith*, 1 *Ves.* 258, *et antea* 133.

(2) *Sarjeson v. Cruise*, cited p. 477, is S. C. with *Sergeson v. Sealy*, 2 *Atk.* 412; vide also *ibid.* p. 413, note (2), and *ibid.* p. 416, and note. Also *Revell v. Watkinson*, 1 *Ves.* 93, *et antea* 66.

(3) *Exoneration of personalty* from debts, &c. must take place in consequence *either of an express declaration in writing, or of a plain and necessary implication.* Vide 1 *Roper on Legacies*, 277, &c. *Et vide ibid.*, 257, &c.

[202]
VOL. I.

Page 477.

Husband of tenant in tail takes in a mortgage, and is in receipt of the rents and profits.

On a bill to redeem by reversioner after the wife's death, no interest allowed to the husband during his wife's lifetime. (1)

As to tenant for life keeping down the interest of an incumbrance. (2) Real estate rendered by a testator primarily liable. (3)

ASTLEY *versus* POWIS, June, 23, 1750.

(Reg. Lib. 1749. A. fol. 662.)

Page 483.

See also S. C. further, in 1 *Ves.* 495.

Covenant, before the Act reducing the rate of interest, to pay 6 *per cent.* is not prejudiced by the Act; but interest, turned into principal, by the course of the Court, was directed to carry interest at 5 *per cent.* only, from the passing of the Act. Interest by course of the Court, discretionary.

[203]
VOL. I.

Page 485. GIBSON *versus* LORD MONTFORT,
and ROGERS *versus* GIBSON, June 25, 1750.

S. C. 3 Amb. 93.
et vide
4 Ves. 288, note.

(Reg. Lib. 1749. A. fol. 583.—And Reg. Lib.
1752. A. fol. 259, 260.)

NOTES AND OBSERVATIONS.

Devise of real, leasehold, copyhold, and personal estate to trustees, their executors, &c. first for payment of annuities, &c. upon a deficiency of the personality ;
“ and as concerning all the “ *rest residue*,” &c. in trust for the children of A. but if she die without issue, then to B. and C. The intermediate profits pass by this residuary devise.

(1)

Not necessary the word “*heirs*” should have been inserted to carry the fee, for trustees have a fee when the purposes of the trust cannot be answered otherwise. (2)

[204]

Trust

After the devise in the will in favour of the issue of the daughter, the testator thus expresses himself: “ but having made no provision for, the “ disposal of the residue of my said real and personal estates as aforesaid, in case my said “ daughter should die without issue, then, and in “ such case, &c.” as in the report.

The testator, by the first codicil mentioned in the report, after reciting “ that he had by his will “ given *all the residue of his real and personal “ estate to A. and P. in case his daughter should “ die without issue,*” *revokes that part of his will “ relating to A. and substitutes S. S. in his stead,*” &c. &c. R. L.

This is most material: and the Decree seems founded on it. Vide *post*.

(1) As to cases on the accumulation of rents and profits, and otherwise, vide *Thellusson v. Woodford*, 4 Ves. 227, &c. *ibid.* 287, 288. *Mills v. Norris*, 5 Ves. 335. *Shepherd v. Ingram*, Amb. 448.

Hopkins v. Hopkins, cited p. 468, is in 1 Ves. 268, *Forr.* 44, and 1 *Atk.* 581 ; vide Mr. *Sanders's* edit.

As to the difference between the word “ *residue*,”

due," with reference to real or to personal estate, adverted to p. 486, see in *Durour v. Motteux*, 1 Ves. 322, *et antea* (157), the note at the end of that case. *Carte v. Carte*, cited p. 487, is in 3 Atk. 174, and *Amb. 28. Martin v. Savage*, cit. p. 489, is in *Bar. Ch. Rep.* 189. *Potter v. Potter*, mentioned *ibid.* is in 1 Ves. 437, *et ant.* 191.

As to trust-estates in copyholds passing without surrender, vide *Allen v. Poulton*, 1 Ves. 121, *et antea* (76); and *Tuffnell v. Page*, well reported *Barn. Ch. Rep.* 9. 12, 13.

The ultimate determination in the principal case, as to the accumulated rents and profits passing under the devise, was by way of re-hearing before Lord Camden, C. on the 22d of May, 1767; upon the petition of the devisees of the heir, when his Lordship affirmed the Decree. See *Ambler* 97, and the note to 4 Ves. 288.

Beside the enquiries mentioned in the report, p. 494, the Master was also to ascertain, "whether, if there were any such agreement as there mentioned, the same was before the testator's first codicil." The Master was also to enquire, "whether the testator purchased any other, and what freehold messuages and lands after the making of his first codicil, and before the time of making his second codicil." *Reg. Lib.*

It appears from the Master's report, dated in December, 1752, that the articles of agreement were executed before the date of the first codicil, and that the conveyance made in pursuance thereof, was executed after the first codicil, and before the date of the second.

The Court, therefore, on the 19th of March, 1753, declared, that the lands so purchased
"passed

GIBSON
versus
L. MONTFORT,
June 25, 1750.

Trust of Copyhold deviseable without surrender.

But otherwise, as to copyholds of which the testator had the legal estate.

Lands agreed to be purchased after the will, and before the first codicil, pass by such codicil operating as a republication.

Q. ? Whether a codicil relating in its terms only to personal estate, and yet executed according to the statute of frauds, can operate as a republication of a will as to real estate after purchased,
See *Piggott v. Waller*, 7 Ves. 98

GIBSON
versus
L. MONTFORT,
June 25, 1750.

"passed to the devisees by virtue of the testator's
"first codicil, and the re-publication thereby made
"of the testator's will." *Reg. Lib. 1752, A. fol.*
259, 260.

VOL. I.

Page 494.

Bill for partition
will lie as to
tithes.
Demurrer to
such a bill over-
ruled.

BAXTER versus KNOLLYS, June 27, 1750.

(*Reg. Lib. 1749. A. fol. 467.*)

Page 495.

After leave
given to bring
an ejectment, a
new ejectment
cannot be
brought with-
out leave.

SANDS versus SANDS, June 28, 1750.

(*Reg. Lib. 1749. B. fol. 403.*)

DODDINGTON versus HALLET, July 2, 1750.

Page 497.

Vide Buxton v.
Snee, antea 84.

(*Reg. Lib. 1749. A. fol. 625.*)

NOTES AND OBSERVATIONS.

The doctrine in
this case as re-
ported, "that
"part owners
"in a ship are
"partners, and
"liable in
"solido, for
"all goods
"furnished,
"and repairs
"done," has
been over-ruled,
[206]
on great consi-
deration. (1)

(1) VIDE per Lord Eldon, C. *ex parte Young*, 2
Ves. & Beames, 242. *Ex parte Harrison*, in
M. of Nicholson, 2 *Rose Rep. in Bankruptcy*,
and *Brent v. Hay*, Feb. 10, 1815, which governed
many other cases waiting that determination. ED.

It appears rather singular that Lord *Hardwicke*
should have said so much as is reported on the
subject of the contractors being partners, since
the agreement between them on the inception of
the undertaking, negatives such a supposition as
strongly as terms could make it, and since this
very

very argument is pressed by the Defendant's Counsel, towards the top of p. 498.

DODDINGTON
versus
HALLET,
July 2, 1750.

The contract was in the following terms ;

“ 2d April 1747.—We, whose names are here-
“ unto subscribed, do hereby authorise, empower,
“ and appoint *Thomas Hall* to build, or contract
“ and agree for building, for us a ship or vessel of
“ the burthen, &c. whereof —— is to go com-
“ mander, to be intended for service of East India
“ Company, and we do hereby severally, and not
“ jointly, covenant and agree every one of us, and
“ for himself, to and with the said *Thomas Hall*,
“ not only to take and hold the several parts
“ with our names hereunto written, of such ship
“ as he the said *T. Hall* shall build, or contract or
“ agree for building for us, as aforesaid, but also
“ to pay our proportionable shares according to the
“ several parts with our names here-under written
“ of the money as shall be paid or agreed to be
“ paid for building such ship, and also of charges
“ and disbursements that he shall expend or lay
“ out, or cause to be expended or laid out, in or
“ about the victualling, manning, or equipping
“ out the said ship to sea, and that at such times,
“ and in such manner and form, as he the said
“ *T. Hall* shall agree or contract for.”

The case in *Reg. Lib.* as to its circumstances, founded on this agreement, is as follows :

It appears that *Hall* had got a bill of sale from the builder of the ship, and having never made any bill of sale or assignment to the Plaintiffs of their respective shares, or contributed any thing for or in respect of ten 32 parts left unsubscribed for, the bill “ prayed, that the Defendant might
“ be

DODDINGTON
versus
HALLET,
July 2, 1760.

“ be decreed to assign or make bills of sale to the
 “ Plaintiffs of their respective shares and interest
 “ in the ship, and to deliver up to them such
 “ general bill of sale, and that he might be re-
 “ strained from making any assignment, or bill of
 “ sale, of the ship, or any part thereof, until the
 “ hearing of the cause, and might account with
 “ the Plaintiffs for what *Hall* ought to have con-
 “ tributed towards the building and fitting out
 “ the ship, in respect of the said ten 32 parts so
 “ left unsubscribed for, and might pay the same
 “ as the Court should direct; or, otherwise, that
 “ such ten 32 parts might be sold for that purpose,
 “ or assigned to the Plaintiffs: and that the Plain-
 “ tiffs might be indemnified in such manner as
 “ the Court should think fit, from such trades-
 “ men's debts as should appear to have been con-
 “ tracted on the ship's account by *Hall*.”

The Defendant admitted that *Hall* had received more on account of the ship than he had actually expended thereon, without contributing any thing for the remaining ten 32 parts; but he insisted that *Hall*, by purchasing and fitting out of the ship, and contracting debts on account thereof, to the amount of 7392*l.* which he at his death stood indebted, and personally liable to pay, as the contracting party therein, over and besides the monies actually paid by him on account thereof, he, *Hall*, might be said to have contributed more than his share and proportion of the costs and charges of building, &c. in respect of the said ten 32 parts remaining undisposed of, or unsubscribed for. The Defendant, therefore, after stating that *Hall* died indebted to a much greater amount

amount than his assets would extend to pay, insisted, that such ten remaining 32 parts belonged to *Hall* in his own right, as an original part owner, by virtue of the bill of sale, and as remaining to him undisposed of, and unsubscribed for, and for which he stood liable and engaged even beyond his share and proportion of the costs and charges, &c.; and as the Plaintiffs could not (as the Defendant apprehended) pretend to be entitled to the same, having subscribed for, or agreed to take, only their own particular parts, and that such remaining ten 32 parts were part of *Hall's* personal estate, and that *Hall* was under the bill of sale trustee for the Plaintiffs, but not as to such ten two-and-thirtieth parts, and that the Plaintiffs had not any specific lien thereon.

DODDINGTON
versus
HALLET,
July 2, 1750.

The Decree directed an account of all dealings and transactions between the Plaintiffs and *Hall* in his lifetime, and between them and the Defendant, as his administrator, since his death, as *partners* in the ship, and in the building, equipping out, victualling and manning, and in the earnings of the said ship; in taking which accounts, the Master was to make all parties just allowances, and particularly an allowance to the Plaintiffs of all sums of money which they had paid, or were liable to pay, to any workmen or tradesmen for building, &c. or for seamen's wages; and in case it should appear that the Defendant, as administrator of *Hall*, was a debtor to the Plaintiffs upon the balance of such accounts, then the Court declared, that the Plaintiffs had a specific lien upon the shares which *Hall* was entitled to in the ship at the time of his death, for so much as should be due to them upon the balance of that account;

DODDINGTON
versus
HALLET,
July 2, 1750.

account; and in that case that the shares so belonging to *Hall* should be sold, &c. and the money arising, &c. should be applied in the first place, in payment of what should be so found due to the Plaintiffs upon the balance of their said accounts, &c. But if the Plaintiffs should be found to be debtors to the Defendant, as administrator of *Hall*, upon the balance of the said account, &c. then what should be so found due from the Plaintiffs respectively, should be paid by the Plaintiffs respectively to the Defendant. And in case, in taking the said account, any allowance should be made to the Plaintiffs for any sum of money which they were liable to pay to such workmen, &c. and which they should not have actually paid, then the Plaintiffs were to indemnify the Defendant, as administrator, &c. and his estate therefrom. *Reg. Lib.*

VOL. I.

SEED *versus* BRADFORD, July 12, 1750.

Page 501.

(*Reg. Lib.* 1749. *B. fol.* 399.)

Father having
to pay a legacy
to his daughter,
gives her a
greater sum on

NOTES AND OBSERVATIONS.

her marriage, and no demand of the legacy, though knowledge of it, during the daughter's life. This held a satisfaction, and the husband not entitled.

Wood v. Bryant, there cited, is in 2 *Atk.* 521.

PRYSE *versus* LLOYD, July 13, 1750.

(Reg. Lib. 1749. B. fol. 403.—and Reg. Lib.
1750. B. fol. 644).

[210]

VOL. I.

Page 503.

NOTES AND OBSERVATIONS.

(1) It appeared on the Master's special report, that the witness was not a creditor of the testator at the time of his *second examination* under the inquiries directed, as in the report p. 503; and *it not appearing* he was such a creditor at the time *of his attesting the will*, the Lord Chancellor said he would not enter into a minute inquiry about *that*, whether he was or no. Vide 2 Vol. 374.

Since the decision of this case, the stat. 25 Geo. II. ch. 6. has removed all doubts as to the competency. and credit of devisees or legatees who have *beneficial* interests given them, being attesting witnesses: and it seems to make a wise regulation as to the case *of creditors*. In the former instances, it makes the bequest in their favour utterly void. In the latter, it declares, that creditors shall be admitted as witnesses to prove the execution, &c. but provides that in either case *the credit of the witnesses*, and all the circumstances, shall be left to the Court and the Jury.

Vide S. C. 2 Ves.
374. (1) et pos-
tea (364)

As to a witness
to a will being
a creditor of
testator (2)
before the Act
25 Geo. II. c. 6.

[211]

VOL. I.

Page 503.

COLE *versus* GIBSON, July 18, 1750.

(Reg. Lib. 1749. A. fol. 631.)

NOTES AND OBSERVATIONS.

Marriage—
Brocage. (1)

Quere,
Whether a
demurrer will
not lie to a
supplemental
bill, in nature
of a bill of re-
view, upon the
discovery of new
matter, on ac-
count of Plain-
tiff not having
obtained leave
of the Court,
and made the
usual deposit.
(2)

(1) VIDE *Scribblehill v. Brett*, 4 Bro. P. C. 144, octavo edit. and the note at the head of that case. *Hall v. Potter*, Show. P. C. 76. *Arun-
del v. Trevillian*, 1 Ch. Rep. 47. See also 1 Ves. 277, and 2 Ves. 549.

(2) It seems that such a demurrer would hold. See Lord *Hardwicke's* Order, 2 Atk. 139, note. Vide also *Gould v. Tancred*, ibid. 534. *Wortley v. Birkhead*, 2 Ves. 571, 576, and 3 Atk. 809. *Moore v. Moore*, 2 Ves. 597, 598, *et postea*.

Such leave of the court will not be granted, except upon affidavit that the new matter could not be produced, or used, at the time when the Decree was made. *Mitford* 78, *et vide* *Ludlow v. McCartney*, 2 Bro. P. C. 67, octavo edit.

In the principal case, with reference to all the points, it appears that the trial did not come on till four years afterwards, viz. on the 23d of July 1754; when, on the first issue, the Jury found that the bond was not executed in consideration of or, &c. but that it was given to the Defendant for her long and faithful services, and proceeded from the Plaintiff B.'s wife's affection to her, and no other consideration.

On the second issue, they found that the 1000*l* was not made payable by the bond, at or on the marriage of the Plaintiff, but was made payable six months from the date thereof.

On

**On the third issue, they found that the annuity was not provided for, or granted to the Defendant in consideration of the bond, or of procuring or assisting the plaintiff in his marriage, but that it was granted to the Defendant out of real regard and affection for her, and not from any other motive, or consideration.*

COLE
versus
GIBSON,
July 18, 1750.

[*212]

The Plaintiff, however, seems to have thought of a new trial; and it appears from the Registrar's Book, that he on the 12th of February, 1755, applied to the Court, stating the above circumstances, and alleging that on the very morning of the trial, and not before, Mr. T. who formerly was his Attorney, and prepared the marriage articles, but who had never been employed by him since, found a writing, or agreement, which the Plaintiff had caused to be drawn up in the country, whereby he proposed to covenant, that if the marriage should take effect, he would, within six months after it, pay the Defendant 1000*l.* and secure to her an annuity of 100*l.* for her life, which paper writing was offered, but through inattention was not read at the trial; and that, as the Plaintiff apprehended, it manifestly appeared from such paper, that as well the bond as the annuity, was founded on a marriage brokerage agreement; he had, therefore, filed his supplemental bill, to avail himself of such paper, and for a discovery touching the same, to which the Defendant had put in a demurrer and answer, and had demurred to the whole relief, and not to any part of the discovery. And he stated that the cause of demurrer assigned was, that the Plaintiff ought not, by the rules of the Court, to exhibit a supplemental bill, in the nature of a bill of

[213]

COLE
versus
GIBSON,
July 18, 1750.

of review, without leave for that purpose, and making the usual deposit; and that Defendant had obtained an Order that the demurrer should be set down for argument at the same time with the original cause upon the equity reserved. The Plaintiff then stated, that he had given notice of motion for a new trial, but was advised that the demurrer was necessary to be argued before either that motion, or the cause, should come on upon the equity reserved, inasmuch as the discovery made by the Defendant in her answer might be very material on that motion, and probably put an end to the dispute. He therefore prayed, and obtained an Order that the demurrer might come on to be argued shortly. *Reg. Lib. 1754, A. fol. 160.*

No further entry appears relative to this demurrer: but it appears that the several matters in question were afterwards accommodated. As to such a demurrer, *vide* the note to p. 504 of the rep.

Upon the cause coming on (June 7, 1755) upon the equity reserved, the Court, upon hearing read the postea, and an agreement entered into between the parties, decreed, by consent of all parties, that the Plaintiff *Bennet* should forthwith pay to the Defendant 600*l.*; and should also pay to her 50*l.* *per annum* for her life, to commence from Lady-day then last, and should advance to her 100*l.* on the said annuity; and assign to her a bond debt of 50*l.* due to him from her brother: and, as to all other matters, the bill was to stand dismissed, without costs on either side. *Reg. Lib. 1754. A. fol. 398.*

[215]

Hall v. Potter, cited p. 507, is in *Show. P. C.* 76.

As

As to the point of *confirmation* of improper contracts, &c. vide in *Morse v. Royal*, 12 *Ves.* 355; *et per Lord Thurlow*, C. in 1 *Ves.* Jun. 220.

COLL
versus
GIBSON
July 18, 1750.

CORNWAL *versus* WILSON, July, 23, 1750.

(*Reg. Lib.* 1749. *A.* fol. 611.)

VOL. I.

Page 509.

NOTES AND OBSERVATIONS.

THE bill alleged, that after the arrival of the ship, the Defendant unloaded the hemp as his own, and afterwards put it on board another ship and sent it to Portsmouth, where he delivered it according to his contracts with Government. The Defendant insisted, he disposed of it as agent to the Plaintiffs, and not on his own account; and denied he delivered it at Portsmouth to make good any contract of his own. He nevertheless admitted, that he caused part thereof to be sent to Portsmouth on board another ship, to be delivered to the Commissioners of the Navy, on a contract made with them by *R. G.* The Defendant said he tried to sell the hemp in London, on the Plaintiff's account, but could only sell a small part at a low price.

Plaintiff, a factor abroad having exceeded the price limited for a purchase of hemp; the Defendant, who objected to the contract, but afterwards re-shipped, and disposed of some of it on a new risque, was ordered to account for the whole at the cost price.

The Court declared, "That the Defendant by
"the acts done by him, after the hemp in ques-
"tion was brought into the port of London, and
"by the sale and disposition thereof, *and sending*
"the same to Portsmouth on a new risque, had
"taken the said hemp upon himself, and ought
"to account to the Plaintiffs for the same, accord-
"ing to the price of 14 and a half rix-dollars, *per*

[215]

Q

" ship's

CORNWALL
versus
WILSON,
July 23, 1750.

"ship's pound; being the price at which the Plaintiff bought the same at Riga."—It was therefore referred to the Master to take an account of all dealings and transactions between them relating thereto. *R. L.*

VOL. I.
Page 511.

WILLIAMSON versus CODRINGTON,
July 21, 1750.

(Reg. Lib. 1749. B. fol. 577.)

NOTES AND OBSERVATIONS.

Voluntary provision in trust for natural children, good against the father's representative. The estate having been sold by him for a valuable consideration, the Plaintiffs were decreed to have satisfaction out of his assets, as there were words in the deed amounting to a covenant. (1) An account being directed, a deduction was made in respect of their maintenance.

[216]

As to voluntary deeds, vide *Coleman v. Sarrel*, 1 Ves. Jun. 50.

(1) The father expressed to bind himself, his "heirs, executors, administrators, and assigns."

Besides what is mentioned in the report p. 512, as to the bill, it stated, that various negroes and their issue, were removed from this plantation to others by Sir *William*, where they were afterwards wholly used, and employed for his benefit. An account as to them was also prayed, and it was decreed accordingly, *vide post*.

(1) The answer alleged, that the Plaintiff and his brother, after having been maintained in England at the expence of Sir *William* for a considerable time, returned to Antigua, from which time Sir *William* not only supported, but from time to time made a large and ample provision for them, in order to advance and settle them in the world, and expended upon them more than the value of the plantation and premises in the trust deed: and the Defendant stated she was not only induced to believe that such payments and advancements were intended by Sir *William* in full satisfaction,

satisfaction, as well of the provision pretended to have been made for them by the deed, as of all other provisions which he ever proposed for them, from the repeated declarations of Sir *William* himself, in several letters and otherwise, but also that the same was so received and accepted by the Plaintiffs, and from the value of the same, and the manner in which it was from time to time made; and that Sir *William* apprehended himself at liberty to revoke the deed at all times thereafter, and to provide for them otherwise; and that he, therefore, would never have made so large a provision as he did for them, if he had not intended to do so: for which reasons the Defendant insisted, that in accepting the provision so made for them, they accepted it upon the terms and conditions upon which it appeared to have been made, viz. as the only provision they were ever to accept from him. And she further insisted, that by never claiming the benefit of the deed in Sir *William's* lifetime (though they were both of age long before he died) they acquiesced and relinquished all right and title, which (if any) they might otherwise have been entitled to.

The Defendant hoped if such pretended deed should appear to be any way defective, or void, in point of Law, either for want of an attornment thereto, by the tenant, or by reason of its not being recorded in the Registrar's office, or for any other reason, she should not be prejudiced by her ignorance of the laws and customs of St. Christopher; but should have the full benefit of all advantages arising from such defects, as fully as if she had pleaded the same, in bar to the Plaintiff's setting up, or insisting upon the said pretended deed. *R. L.*

WILLIAMSON
versus
CODRINGTON,
July 21, 1750.

[217]

WILLIAMSON
versus
CODRINGTON,
July 21, 1750.

The Court, after declaring that the Plaintiff *William*, in his own right, and the Plaintiffs *William* and *J. J.* as executors of *John*, were entitled to satisfaction for the plantation, and the negroes, &c. comprised in the deed, from the time of the death of Sir *William*, according to the directions after-mentioned, directed the Master to enquire into, and settle, what was the value of the plantation in sterling money, to be sold when Mr. *G. M.* recovered the said plantation, &c.; and that the Defendants, the executors of Sir *William*, should be charged in such account with such value; and the Master was to compute interest at 4*l. per cent.* from the death of Sir *William*, for the sum that should be so settled for such value; and he was likewise to take an account of such of the negroes, slaves, horses, cattle, coppers, stills, and mill, granted by the deed, as were in being at the time of the death of Sir *William*, or were sold or disposed of by him during his lifetime, and for what sum the same were so sold or disposed of; and of the value of such of them as were converted to the use of Sir *William*, in his life-time; and the Master was in such account to charge the Defendant with the value of such of the negroes, &c. as were in being at the death of Sir *William*, as the same stood at the time of his death; *and also of such of them as were converted to his use in his life-time, as the same then stood; and also with the price or value for which any of them were sold or disposed of in his life-time.* He was also to take an account of the *offspring and increase* of the said negroes, horses, and cattle; and whether any of such offspring and increase were in being at the time of his death, or were sold

[218]

sold or disposed of by him in his life-time; and the Defendants *were to stand charged with the value of such offspring and increase as were in being at the time of Sir William's death, or were sold or disposed of by him in his life-time.* And the Defendants were to pay to the Plaintiffs what should be found due upon the balance of such account. The Court reserved the consideration of interest as to the account of the negroes, and other specific things, and of the offspring and increase of the negroes and cattle, till after the Master's Report. *Reg. Lib.*

WILLIAMSON
versus
CODRINGTON,
July 21, 1750.

Vernon v. Vernon, cited p. 513, is in 1 *Bro. P. C.* 267, octavo edit.

GRIGBY *versus* COX, July 24, 1750.

{*Reg. Lib.* 1749. *A. fol.* 647.)

VOL. I
Page 517.

NOTES AND OBSERVATIONS.

(1) *VIDE Allen v. Papworth*, 1 *Ves.* 163, *et antea* (88).

In the principal case the wife averred by her answer, that she executed the deeds by the compulsion and threats of her husband, and for fear that she should lose her life if she refused. *R. L.*

Lord Thurlow observed upon this case in *Hulme v. Tenant*, 1 *Bro.* 17. that the report of it by Mr. Vesey, was defective inasmuch as it did not state the trust. Upon consulting the *Reg. Book* however it appears that the Report in this respect is substantially correct.

Purchase from a wife of part of her separate estate, (1) without her trustees joining; with a covenant by the husband, that it was free from incumbrances. There being no proof of the husband's improper influence, although it was alleged, the pur-

Thayer v. Gould, mentioned at the end of the case

[219]
chase

GRIEBY
versus
Cox,
July 24, 1750.

chase was effectuated ; (2) but as to the husband's covenant, the wife held not bound ; and there being an incumbrance, the Plaintiff's remedy was against the husband alone. (3)

case, page 519, is in 1 *Atk.* 615, and *Reg. Lib.* 1739, *B. fol.* 152.

(2) For the doctrine upon this subject, agreeably to the principles in this case, which has often been much noticed, see in Mr. *Bell's* edition of Mr. *Brown's* Reports, the important cases of *Hulme v. Tenant*, 1 *Bro.* 16. *Fraiser v. Baillie*, *ibid.* 518. *Fettiplace v. Gorges*, 3 *Bro.* 8. *Pybus v. Smith*, *ibid.* 340, &c. &c. with the Editor's notes upon each of them ; which refer to most of the subsequent cases. The general substance of the principle thus settled, is, that property given for the separate use of a married woman, is as disposeable by her, as property is disposeable which belongs to persons absolutely *sui juris*. Mr. Roper's very valuable work on Marital Law, has been published since the first edition of the present work, which the editor suggests should be consulted upon all cases bearing on the subject.

(3) His Lordship decreed that the husband should indemnify the Plaintiff in respect of the dower.

VOL. I.
Page 519.

BARRET versus BECKFORD, July 24, 1750.

(*Reg. Lib.* 1749. *B. fol.* 619.)

NOTES AND OBSERVATIONS.

Testator being under an obligation to pay an annuity to M. P. bequeaths the residue of his estate

THE testator was *residuary legatee* as well as executor of his uncle. *R. L.*

This is *not quite* immaterial ; Lord *Hardwicke* mentioning in his judgment, that " he owed every thing to his uncle."

Lee

Lee v. D'Aranda, Door v. Geray, and Blandy v. Widmore, cited in the Report, pp. 519, 520, are in 1 *Ves.* 255, and 1 *P. W.* 324.

BARNET
versus
BACKFORD,
July 24, 1750.

Upon the several points *vide* 2 *Ves.* 37, Mr. Cox's note to *Blandy v. Widmore*, 1. *P. W.* 324; the note to *Lee v. D'Aranda, antea* (2); *Free-mantle v. Bankes*, 5 *Ves.* 79; *Twisden v. Twisden*, 9 *Ves.* 413; and *Garthshore v. Chalie*, 10 *Ves.* 1.

tate for the benefit of his mother and M. P. for life. This is not to be considered in satisfaction of the annuity.

(1) See *Flanders v. Clark*, 1 *Ves.* 9, *et antea* (12); and *Butterfield v. Butterfield*, 1 *Ves.* 133, *et antea* (81).

Limitation over "after legitimate heirs," too remote, unless capable of being confined to the period of the party's death. (1

remote, unless capable of being confined to the period of the

PIERS versus PIERS, July, 23, 1750.

(Reg. Lib. 1750. B. fol. 97.)

[220]

VOL. I.

Page 521.

NOTES AND OBSERVATIONS.

THE cause came on ultimately for judgment on the 10th of the following December, when the Court dismissed the supplemental bill, *but without costs*; and as to the original bill, decreed, that certain lands which had been purchased by the father, and conveyed to his own use, should be settled according to the agreement, and exonerated by him from some incumbrances. In the father's answer to the supplemental bill, he said, "that the Plaintiff, having declined all offers for an accommodation, and being determined to prosecute the suit, and put him to expence therein, he insisted he had a right to pay himself the expences of such suit, out of the estate, of which, by the

Father, tenant for life, procured his son, who was tenant in tail, to join in raising money, which the father received and applied to his own use. Decreed to exonerate the estate; the son being only in the nature of a surety for it, as the debt of his father. Injunction refused to restrain the father, who was

PIERS
versus
PIERS
July 23, 1750.

was without im-
peachment of
waste, from re-
moving a deal
floor he had
placed, and
young oaks he
had planted,
breaking up
meadow land,
&c. To ground
such an injunc-
tion, there must

the Plaintiff's own shewing, he, the Defendant, was tenant for life, *sans* waste; and that he could take down several ornaments he had put up at Bradley House, and leave it in the same condition he found it; *viz.* a farm house; and that he would go as far as the law or his right would allow him, in cutting down timber and trees, and breaking up ground in the settled estate; which he had accordingly done." *Reg. Lib.*

These expressions very probably induced Lord *Hardwicke* not to give him the costs of the supplemental bill.

be waste and spoliation, and no delay in applying for it.

[221]
VOL. I.
Page 522.

CONYNGHAM *versus* CONYNGHAM,
July 31, 1750.

(*Reg. Lib.* 1749. *A. fol.* 635, 637.)

NOTES AND OBSERVATIONS.

On a Rehearing, the former Decree having been drawn up on Defendant's default at the hearing. Devise of "rents, profits and produce" (1) of West India estates to be consigned to trustees, and applied by them in disencumbering

(1) ALTHOUGH formerly several Judges seem to have followed each other in saying broadly that a devise or settlement of "*the profits*" of lands is the same as "*a devise of the land,*" and implies *any profits the land will produce by sale, &c.* (vide in *Trafford v. Ashton*, 1 *P. W.* 418, 1 *Ves.* 41 and 171); yet Lord *Hardwicke* seems to have been fully sensible they had gone too far (see 1 *Ves.* 41 :) and it appears that Mr. *Cox's* observation on *Trafford v. Ashton*, 1 *P. W.* 418, note, is not only a sound one, but has been adopted in later cases.

The

The note there intimates, "it seems that the natural meaning of the word 'profits' is 'annual profits;' and that the cases which have extended it further are exceptions out of the general rule, in which the context afforded a different construction."

Vide *Ivy v. Gilbert*, 2 P. W. 19, &c. &c.

Besides the cases mentioned by Mr. Cox, in confirmation of what he thus states, the author of these notes would suggest, that even the principal case of *Conyngnam v. Conyngham*, taken altogether, might also be adduced for the purpose.

However that may be, later decisions have adopted Mr. Cox's position: see most of them, and the cases forming several of the exceptions in the late case of *Allan v. Backhouse*, 2 Ves. and B. 65.

The author of these notes can scarcely, perhaps, furnish a stronger instance than the important case of *Belt v. Mitchelson*, determined by Lord Eldon, C. on the 17th December, 1811, when his Lordship, affirming the decree of Sir W. Grant, M. R. seems to have settled the point accordingly; besides manifesting another serious and well-founded distinction, elicited by the argument; viz. that although a grant or devise of "rents and profits," without more expressed, or to be inferred, will not pass real estates of inheritance, or a term thereon attendant, &c. (inasmuch as what is not expressly given out of an estate of inheritance remains with the owner of it, or his heir); it may yet pass the whole interest in a term in gross, whether for years or for lives, agreeably to the reasoning in *Goffe v. Hayward*, 1 Rolle's Rep. 247 and

CONYNGHAM
versus
CONYNGHAM,
July 31, 1750.

bering an estate in Scotland of debts, and also in payment of other debts, funeral expences and legacies. Held on rehearing, that such charges could only be paid out of the annual perception of rents and profits; and that part of the [222]

former Decree, which had directed a sale, was reversed. A trustee, with notice of his appointment as such, interfering with the subject matter, cannot repudiate the trust, and say he acted merely as factor or agent.

CONYNGHAM
 VERSUS
 CONYNGHAM;
 July 31, 1750.

and 368. [See a short report of it at the end of the principal case.]

The principal case of *Conyng-
 ham v. Conyng-
 ham* seems to require some exposition rather at length.

The Plaintiff was the widow of *Robert Cun-
 ingham*, and was entitled to an estate for life in certain lands, &c. in Scotland; and also to an annuity of 200*l. per annum* under his will and the deed of gift next mentioned.

The original bill first stated a deed of disposition revocable, executed in Scotland, whereby the testator (*inter alia*) "obliged himself, his heirs and successors, who should inherit his estate or plantation of Cayon, in the island of St Christopher, to clear his above-mentioned lands, &c. in Scotland, of all debts, and to warrant his assignation thereof, &c."

By his will, dated October 27, 1743, the testator, after directing that the lands and houses at Basaterre Town, in the said island of St. Christopher, should be affixed and annexed to his said plantation at Cayon, "charged"* his said plantation and lands, &c. to *Daniel Cunningham* and others, and the Defendants *Coleman*, and their heirs, in trust, for payment of his funeral expences, debts, and legacies; and to keep the said plantation in good repair, and to keep the negroes, with their increase, and the stock thereon, in as good condition as they were in at his death, "out of the rents and profits" of his said plantation, &c.

* The word "charged" seems used in the sense "committed," "entrusted."

He then declared a further trust for the benefit of his son *Daniel*, whom he empowered to charge the said premises with a sum equal to double what he should receive for his wife's fortune, and gave the remainder of said estates to *Daniel* and the heirs male or female of his body.

CONYNGHAM
VERSUS
CONYNGHAM,
July 31, 1750..

In default of such issue, the remainder to the testator's daughter, *Mary R.* and others, to have the profits of the said plantation and premises during their lives, as tenants in common; "the same to be kept in good repair, with the stock, &c. thereon;" and with divers remainders over.

The testator then directed, "that the produce" of his plantation at Cayon (after defraying its charges) should be from time to time shipped as Coleman, his heirs or assigns, should direct, "and be consigned to him and them, until his, the testator's, funeral charges, debts, and legacies should be paid: and he gave him and them power, 'out of the said produce, as the same should be remitted,' to pay his debts and legacies in Great Britain, with interest, agreeably to his said will, and without any order from his executor (who was the said *Daniel C.*) or any other person who should afterwards come to inherit the said plantation and lands.

[224]

"And the better to secure such consignments, he directed all who should inherit his said plantation, &c. to send an account every year to his, the said testator's, said trustees, of the whole produce thereof, and how it was applied; in which, if there should be any neglect or misapplication, his said trustees might appoint an overseer or manager upon the said plantation."

The bill stated (among other things) the Plaintiff's

CONYNGHAM
versus
CONYNGHAM,
July 31, 1750.

tiff's hopes, that the Defendants would have cleared the estate, &c. in Scotland, which was left to her, of all the testator's debts, &c. out of the said testator's plantation and lands, agreeably to the said deed of disposition and his will; but that on the contrary the Defendants had encouraged the testator's creditors to claim and enforce their demands out of the said Scotch estates, and had otherwise much distressed the Plaintiff, and put her to the expence of suits, &c.

[225]

The bill therefore prayed, " that the Defendants " would set forth whether they would accept or " refuse the trust, and also an account of the trust " estate, and the produce thereof, &c. &c.: and " that they might be compelled ' *out of the rents* " *and produce, and, if necessary, by mortgage or* " *sale of the said plantation estate,*' to disencumber " *and clear the said lands, &c. in Scotland;*" and to satisfy the Plaintiff all arrears and growing payments of her annuity: and in the mean time, that an overseer or manager might be appointed, if necessary, &c. &c. *The Defendants did not appear at the original hearing, though duly served; so that the Decree was taken by default.* The original hearing was on the thirteenth April, 1749. That part of the Decree material to the points in question in the Report, was *drawn up so as to direct a sale* of the plantation estate, &c. to make good any deficiency there might be with respect to the debts, legacies, &c. in the rents, profits, and produce to be accounted for.

The cause, therefore, came on before Lord *Hardwicke*, as stated in the report, by way of re-hearing, on this point more especially, as well as on the other objection there noticed. Lord *Hardwicke*,

wicke, C. ordered, that the Decree should be varied, and be (in effect) as follows:—

CONYNGHAM

versus

CONYNGHAM,

July 31, 1750.

It was declared, that the will should be established, and the trusts thereof performed, which was decreed accordingly. An account was then directed as to the arrear of the Plaintiff's annuity; also as to the testator's debts and incumbrances affecting his Scotch estate, &c. and of all other his debts, funeral expences, and legacies, &c.

Plaintiff, the widow, was to stand in the place of such creditors who had received, or should receive, their debts out of the Scotch estates.

An account was decreed from *Daniel C.* and *W. Coleman*, of the rents, profits, and produce of the plantation in Saint Christopher, called Cayon Plantation, and of the lands and houses in Bassa-terre Town affixed or annexed thereto by the will; and out of what should be coming on that account, the several debts and incumbrances of the testator affecting his Scotch estate, &c. were to be paid and satisfied. Plaintiff, the widow, to be paid thereout such debts as had been paid, or should be paid, out of the Scotch estate; and also such costs and damages as she had been put to, or sustained, or should sustain, by any action or suits brought by the creditors relating thereto, to be settled by the Master, and also the arrears of her annuity; the Defendants to pay accordingly.

[226]

And out of the *rents, profits, and produce* of the said plantation estate, the Plaintiff was to be paid her annuity in future. The testator's creditors, annuitants, and legatees to come in and prove their debts, &c.

After satisfaction of the testator's debts and funeral expences, arrears of the annuities, &c. the residue

CONYNGHAM
versus
CONYNGHAM,
July 31, 1750.

residue of the rents, profits, and produce to be applied in payment of *the legacies, pari passu*.

That the Defendant *Coleman* should make his election, whether he would continue to act in the trust under the will, and postpone the payment of his own incumbrance on the Cayon Plantation, pursuant to the will.

If he should elect so to do, then Defendant *Cunningham* was to consign the produce of the plantation estate to him, to be applied according to the will and that Decree.

[227]

If he should elect not to do so, then the Master was to appoint a proper person in London, as consignee, the produce to be applied according to the will and that Decree.

And as to any sums paid by *Coleman* to *Cunningham*, out of the profits and produce, &c. which should not be allowed him by the Master, by way of just allowances in the said account, the Defendant *Cunningham* was to indemnify him in respect thereof, &c. &c. *R. L.*

L. BELT, ESQ. v. MITCHELSON & R. BELT, ESQ.

Rolle, March 15, 1800.

Affirmed on Appeal by Lord Eldon, C. Dec. 17, 1811.

Grant or devise
of "rents, and
profits," referable
to a term in
gross, or mere
chattel interest,
will pass the
whole interest in
the

The case of *Belt v. Mitchelson and Belt*, was in substance, this: "Shortly after the marriage of Mrs. B. (the mother of the material parties,) a settlement was made of her husband's and of her real estates, under which (*inter alia*) a term of 1000 years was created out of her estates, and vested

vested in trustees, who were directed " out of the
 " rents and profits of the said premises so limited
 " to them as aforesaid, and as they should, from
 " time to time, as the same became due, receive
 " them, raise, levy, and pay unto the eldest son of
 " the marriage, during so many years of the said
 " term as he and his mother should happen jointly
 " to live, not exceeding one third part of the clear
 " rents and profits of the aforesaid premises so
 " limited to them, or so much of the rents and
 " profits of the said premises, not exceeding one
 " third part thereof, as the father should appoint,
 " during such joint lives of such eldest son and his
 " mother. And upon further trust, that in case
 " there should be, besides an eldest son, a younger
 " child or children, issue of the said R. B. and
 " *Elix.* his wife, that then the trustees should pay
 " all the residue of the rents and profits annually
 " arising from the said premises, as they should
 " receive the same, unto such younger child, or
 " younger children, equally and proportionably,
 " during the joint lives of the mother and eldest
 " son."

BELT
 versus
 MITCHELSON
 and BELT.

the term.
 Contra as to a
 term carved out
 of an inherit-
 ance.

[228]

*Then followed the material clause on which the
 question arose, and which was as follows ; " And
 " also upon this farther trust, that in case such
 " eldest son, for the time being, shall happen to
 " die in the life-time of his said mother, or his said
 " mother shall happen to die in the life-time of such
 " eldest son, then, upon trust, that they, the said
 " trustees, or the survivor of them, or the executors,
 " administrators, or assigns, of such survivor,
 " shall and do pay the whole of the rents and profits
 " arising from the said premises so limited to them,
 " to such younger child, if only one, or to and
 amongst*

BELT
versus
MITCHELSON
and BELT.

" amongst such younger children, if more than
" one, equally and proportionably."

The father died; the mother survived him many years, and enjoyed the possession of the paternal estates, according to the settlement, as her jointure.

There were but two surviving children of the marriage, and the question arose merely as to the estate *ex parte maternâ*.

[229]

During the mother's life-time, the rents and profits of the maternal estates were received by the eldest son, and youngest son, in the unequal proportions above described.

On the death of the mother, the eldest son succeeding at length to the enjoyment of *his paternal estates*, the whole of the rents and profits of *the maternal estates were duly received by the younger son, according to the trusts of the term*; the inheritance subject to that term, being vested in the eldest son, as the heir and devisee of his mother.

The younger son, conceiving himself entitled, under this settlement, to the whole interest in this term of 1000 years, was preparing to dispose of some of the estates included in it; which being prevented by his brother, the suit was instituted by the younger son against the eldest and *Mitchelson*, a nominal Defendant, who had taken out administration, *de bonis non*, to the surviving trustee of the term.

The estates were of great value, and the case was argued at much length; first at the Rolls, by Mr. (now Mr. Baron) *Richards*, Sir *Samuel Romilly*, Mr. *Heald*, and Mr. *Shadwell*, on the part of the Plaintiff, and Sir *Arthur Piggott*, Mr. *Leach*, and Mr. *Bell*, for the Defendant.

Sir

Sir William Grant, Master of the Rolls, dismissed the bill on the 15th March, 1809 ; holding clearly that the younger child was only entitled to receive the rents and profits during so many years of the term as he might happen to live ; and that the eldest son, representing his mother, as the owner of the inheritance, and having therefore all such rights and interests in the estates in question, as had not been expressly given away from the inheritance, the term was to be attendant thereon, for his benefit.

BELT
versus
MITCHELSON
and BELT.

[230]

The Plaintiff appealed from this Decree ; and the case was solemnly argued before Lord Eldon, C. for several successive days, by the same Counsel, with the addition also of Mr. Sugden, for the Plaintiff and Appellant.

On behalf of the Appellant it was (*inter alia*) contended, according to the old doctrine, that a gift of "rents and profits," was "a gift of the land;" profits of lands implying (as was urged) any profits that the "lands would yield," agreeably to what was stated in the text of *Trafford v. Ashton*, 1 P. W. 418, &c. &c. In addition to this, Sir Samuel Romilly cited the case of *Goffe v. Hayward*, 1 Rolle. Rep. 247, and 368 ; upon which he much relied.

On behalf of the Defendant and Respondent, the deduction from the cases by Mr. Cox, in his note on the very case cited of *Trafford v. Ashton*, 1 P. W. 418, was relied upon, fortified by the authorities there adduced.

Particular stress was laid on the observations made by Lord Eldon, C. in *Maundrell v. Maundrell*, 10 Ves. 270 ; of Lord Macclesfield, C. in *Mills v. Banks*, 3 P. W. 7 ; in *Ivy v. Gilbert*, 2

BELT
versus
MITCHELSON
and BELT.

P. W. 19: and of those also of Lord *Hardwicke*, C. in *Ambler* 95.

[231]

The argument also noticed the distinction made between a rent charge *out of real estates*, and an annuity, &c. out of *a mere term or chattel interest*, as exemplified in *Ambler* 139, 1 *Rolle. Ab.* 831. *Tit. Estate*, and 2 *Vern.* 35. And further, that as to the case cited of *Goffe v. Hayward*, 1 *Rolle Rep.* 247 and 368, it was unnecessary to dispute its positions (though it might be observed it does not appear to have been determined), because that was the case of a *term in gross*, a *mere chattel interest*, which differed entirely, and proved nothing towards the case before the Court.

Lord *Eldon*, C. on the 11th December 1811, affirmed the Decree of the Master of the Rolls, on full consideration during the continued argument of several days; observing, that although the settlement before him was in numerous instances (unnecessary to be mentioned here) so very strange and singular, that it was unlikely the Court would ever have to deal with such another; yet still

The case was a *very important one, upon the doctrine of the above points.*

His Lordship said he fully agreed with the argument of the Counsel for the Defendant, and the positions they had adduced from the cases as above referred to, which he had always considered as clear law.

He certainly *did hold it clear, that as to real estate, whatever the owner of the inheritance had not manifestly departed with still remained with him or his heir, whether it were the estate itself, or a term which had been carved out of it.*

His

His Lordship allowed, that *as to a term in gross*, it might be otherwise; and the doctrine in *Goffe v. Hayward*, which had been cited, seemed to support it. The nature of terms in gross, however, being mere chattel interests, was altogether different from the nature of terms, which had *been carved out of an inheritance* to answer particular purposes.

BELT
versus
MITCHELSON
and BELT.

[232]

In such instances, the Courts of Equity viewed the term as created for the particular purposes, and for no other; *considering the term as attendant on the inheritance, as to every thing beyond them.*

All such portions of *the inheritance*, and trusts relative to an inheritance, as are not manifestly given away, or held to be so from the very nature and necessity of the thing, remain still the property of its owner, or of his heir. The consequence of which was, that every term created out of an inheritance is considered in Equity as attendant on it, when the precise purposes for which it was created have been answered; in the same manner as if it had been so expressly declared.

Applying that rule to the case before the Court, his Lordship saw no trust beyond the payment of the whole of the rents and profits (*receivable as they were, by the terms of the instrument, annually*) to the younger children, or younger child, for so many years of the term as he or they should live. That word "whole" being used in the settlement, in contradistinction to the fraction of two-thirds, which such younger children or child would have been receiving during the joint lives of the elder brother and their mother.

His Lordship, therefore, on the clearest grounds,

BELT
VERSUS
MITCHELSON
and BELT.

affirmed His Honour's Decree, and dismissed the bill.

This Decree was afterwards signed and enrolled without further appeal:

[233]
VOL. I.

Page 524.

GARTH versus COTTON,
July and August 10, 1750, and Feb. 1753.

(Reg. Lib. 1752. A. fol. 240.)

S. C. 3. Atk. 751.
1 Dick. 183.
from Lord
Hardwicke's
notes. Et vide
1 Ves. 546.

NOTES AND OBSERVATIONS.

(1) See the report continued by the Lord Chancellor's Judgment, 1 Ves. 546. Et vide S. C. 1 Dick. 183, &c.

It appears from *R. L.* that the Decree was not actually made till Feb. 1753.

Waste.—
Timber.—
Tenant for
life.—
Tenant for years
&c. without im-
peachment of
waste.
Tenant—n tail
and reversion-
er.—
Rights, powers,
and duties of
trustees to pre-
serve contingent
remainders.
Tenant for 99
years, if he
should so long
live, "without
impeachment of
waste, except vo-
luntary waste,"
with remainder
to trustees to
preserve, &c.
then

The Court declared, that "on all the circum-
stances of the case, the Plaintiff is entitled to
recover satisfaction in this Court for so much
value of his inheritance as the Defendant's tes-
tator exhausted and received, by virtue or co-
lour of the articles entered into between him and
the Plaintiff's late father, who was tenant only
for the term of 99 years, if he should so long
live:" and ordered "that the Master should
compute interest on the sum of 1000*l.* admitted
by the answer of Sir *J. H. C.* deceased, to have
been received by him, from the time of filing the
Plaintiff's bill, after the rate of 4*l.* per cent. per
annum, and tax the Plaintiff his costs; and that
what should be so found due to the Plaintiff for
the 1000*l.* interest and costs, should be consi-
dered

"dered as a demand by simple contract on the
"estate of Sir J. H. C. deceased, and be answered
"and paid to the Plaintiff by the Defendants the
"executors, they having admitted assets of their
"testator Sir J. H. C. by their answer to the bill
"of revivor." *Reg. Lib.*

GARTH
versus
COTTON
July and August
10, 1750, and
Feb. 1753.

The author of these notes has subjoined the
Decree, although it is reported in 3 *Atk.* 758;
since he thinks that each report of so important a
case ought to be complete in itself.

then to his first
son in tail, with
[234]
the reversion to
A. in fee. The
tenant for life
having no son
for a long while,
sells timber, and
divides the pro-
fits with A. the
reversioner, by
agreement be-
tween them-
selves. The
former has
afterwards a
son. That son,
as owner of the
inheritance, en-
titled to recover
what A. so re-
ceived (1)

As to the points in question, see Lord *Hard-
wicke's* Judgment on the principal case, from his
own MS. notes, in 1 *Dick.* 183, &c. *Williams v.*
D. of Bolton, cited 3 *P. W.* 268, note. *Aston v.*
Aston, 1 *Ves.* 264, 396, and the note on it refera-
ble to p. 399, *antea* (175). Et vide *Stansfield v.*
Habergham, 10 *Ves.* 272, 278-9, &c. et *Lansdowne*
v. Lansdowne, 1 *Madd.* 116, &c.

Abrahall v. Bubb, cit. p. 525 as from *Sho.* 69, is
also in 2 *Fræm.* 55.

Litton v. Robinson, cit. p. 526, is in 3 *Atk.* 209,
and 8 *Vin. Abr.* 475. As to that case, see Mr. *San-
ders's* edition, 1 *Atk.* 209, which notices a difference
between the report there and the one in *Viner*.
See also as to *Litton v. Robinson*, in *Stansfield v.*
Habergham, 10 *Ves.* 276, 282.

Jesus Coll. v. Bloom. cit. p. 528, is in 3 *Atk.* 262.

As to the question asked by Lord *Hardwicke*,
page 528, with reference to what the Court would
do with the produce of the timber improperly
cut, see *Bewick v. Whitfield*, 2 *P. W.* 241, and
S. C. 3 *P. W.* 267, 268; and especially Mr. *Cox's*
note to the fifth edition, 3 vol. p. 268; also *Wil-
liams v. D. Bolton*, cited 3 *P. W.* 268, note. *Harg.*

Co.

GARTH
versus
COTTON,
July and August
10, 1750, and
Feb. 1753.

Co. Litt. 218, *b.* note (2); and *Aston v. Aston*, 1 *Ves.* 399, with the note thereon, *antea* (175).

Mansel v. Mansel, cit. p. 529, is in 2 *P. W.* 678. *Partridge v. Pawlet*, cit. *ibid.* is in 1 *Atk.* 467.

[235]

With regard to what is said (p. 529) about *Whitfield v. Bewick*, 2 *P. W.* 240, and 3 *P. W.* 267, being "a little defectively reported," see Mr Cox's note to the fifth edition, 3d vol. 268.

It appears from thence—that *there were* trustees to preserve contingent remainders. That the bill *was not brought by the remainder-men*, together with the infant tenant in tail, as there stated; *but by the tenant for life*, and his son the infant; and that it was brought *merely for the infant's* benefit, its object being to have the produce of the timber secured for the infant.

Pye v. Gorge, cit. p. 546, is in 1 *P. W.* 128.

Mansel v. Mansel, cit. *ibid.* is in 2 *P. W.* 678.

As to which doctrines, see also 10 *Ves.* 278-9.

As to subsequent cases of injunctions relative to trees for ornament or shelter, as noticed at p. 547, see *Chamberlayne v. Dummer*, 1 *Bro.* 166, and 3 *Bro.* 549. *Marq. Downshire v. Lady Sandys*, 6 *Ves.* 107; and *Williams v. Macnamara*, 8 *Ves.* 70, 71.

Darrel v. Champness, cit. p. 548, is in *Eq. Ca. Ab.* 400. *Savile v. Savile*, cit. *ibid.* is in 2 *Atk.* 458, 464.

Littone v. Robinson, cit. *ibid.* is in 3 *Atk.* 209. As to which see Mr. Sanders's edition.

PARKER *versus* PHILIPS, August 1, 1750.
(Reg. Lib. 1749. B. fol. 433.)

VOL. I.
Page 530.

NOTES AND OBSERVATIONS.

THE bill was dismissed, ~~but without costs.~~ R. L. Rolls.

ATTORNEY GENERAL *versus* WHORWOOD,
August 2, 1750; and
WHORWOOD *versus* UNIVERSITY COLL.
OXFORD.

[236]
VOL. I.
Page 534.

(Reg. Lib. 1749. A. fol. 652.—Reg. Lib.
1755. A. fol. 607, 609.)

(1) Lord Redesdale, C. notices in *Bond v. Hopkins*, 1 Scho. & Lefroy, 437, the imperfect state of the Report in the principal case; and makes several important observations on the facts, as developed from some MS. notes in his Lordship's possession, or his own immediate researches. The editor desires to refer to these observations; the following estates, &c. having been taken without immediate reference to them.

The codicil directed, that "the College should never sell, change, or otherwise alienate, the donation of the manor of Denton, or any parts of the lands and tenements thereto belonging, from the purposes intended; which were, that if there should be a Senior Fellow," &c. &c. (as in the report.)

Devise to a college not for academical or collegiate purposes, but merely to make testator's house unalienable, and that one of the fellows should live in it for ever. Lord Hardwicke first thought it questionable whether this is a charity under the 43d of Eliz. and whether a good devise under the Mortmain act; and

One it

ATTORNEY
GENERAL
versus
WHORWOOD,
August 2, 1750,
and
WHORWOOD
versus

UNIVERSITY
COLL. OXFORD.

it was after-
wards deter-
mined to be
void. (1)
Right of the
Crown to direct
the use of an
improper cha-
rity. (4)

[237]

Baron and
Feme.
Husband re-
ceiving pro-
ceeds of a sale
of wife's estate,
and promising
by a note or re-
ceipt to lay it
out, pursuant
to trusts rela-
tive to other
property; this
note held evi-
dence of the
agreement an-
tecedent to the
sale, and estates
purchased after-
wards by the
husband, were
held to be
bound.

Pleading.—
Interrogating
part of a bill
must be sup-
ported by a sub-
stantive

One of the purposes was, "to give entertain-
ment to the poor and needy from the adjacent
parts."

The bequest was afterwards declared void by
Lord *Northington*, C. Vide *postea*, at the end of
the last note in the case.

(2) Vide *Moggridge v. Thackwell*, 7 *Ves.* 36,
and the cases therein referred to, especially pp.
77, 78; *Corbyn v. French*, 4 *Ves.* 418; and *Morice*
v. Bishop of Durham, 9 *Ves.* 399. Affirmed on
appeal by Lord *Eldon*, C. 10 *Ves.* 522; and *Cary*
v. Abbot, 7 *Ves.* 490.

It seems settled by the above cases, that where
the purpose of an intended charitable gift is either
contrary to law, or too general and indefinite, the
disposition is in the King, by sign manual. The
contrary position, therefore, contended in the ar-
gument towards the bottom of p. 536, is not cor-
rect.

The Attorney General v. Baxter, cited page
537, is thus mentioned in Lord *Hardwicke's*
notes :

"The Decree was reversed, *not upon any thing*
" *contradicting the general principle*, reported to be
" stated; *but* because [it was] really a legacy to
" *sixty particular* ejected ministers, *to be named by*
" *Baxter*, and [the same] as a legacy to those
" *sixty individuals.*" Vide per Lord *Eldon*, C. 7
Ves. 76.

(3) Vide page 538. See also *Mitford* 46, and
6 *Ves.* 62.

But where a Plaintiff does make a substantial
charge, even in a general manner, he may inter-
rogate as to all the circumstances. Vide *Mitf.*
45; 11 *Ves.* 296, 301, 302, 376.

As

As to the cases mentioned p. 539, of voluntary deeds being supported against representatives, where they amount to a complete conveyance or transfer of the property, vide *Peck v. Parrot*, 1 Ves. 236, and the notes thereon, *antea* (128).

Smith v. Deacon, cit. p. 540, is in 3 Atk. 323. Vide Mr. Sanders's note, *ibid.* Et vide *Lewis v. Hill*, 1 Ves. 274.

In the principal case the Court declared, "that *Ann Whorwood*, the Plaintiff in the cross cause, was entitled, by virtue of her marriage articles, to have the sum of 4000*l.* therein mentioned, and also the money arising by the sale of her interest in her father's real estate, laid out in the purchase of lands and tenements, to the uses of, and pursuant to, the said articles; and that by virtue of the agreement of her late husband, contained in the paper writing, dated, &c. she was entitled to have the money arising by the sale of her sister *Dorothy's* share in her father's real estate, laid out in the purchase of lands and tenements, to the like uses." "And it appearing, that the whole money raised by sale of the said Plaintiff and her sister *D.'s* shares of her father's real estate, amounted to the sum of 7000*l.*" the Master was directed to enquire what purchases of freehold lands of inheritance were made by *T. W.* after his marriage; and whether such lands were proper to be settled, pursuant to the articles: and if the Master should find that they were, &c. then he was to enquire how much the purchase money thereof amounted to; and the same was to be accepted and settled in lieu and satisfaction of so much of the said two sums of 4000*l.* and 7000*l.*; and the residue of such two sums was to be considered as

ATTORNEY
GENERAL
versus
WHORWOOD,
August 2, 1750,
and
WHORWOOD
versus
UNIVERSITY
COLL. OXFORD.

stantive charge.
(2)
Exceptions.
Voluntary deeds
good against
representatives,
if they amount
to a complete
conveyance or
transfer.

[238]

ATTORNEY
GENERAL
versus
WHORWOOD
August 2, 1750,
and
WHORWOOD
versus
UNIVERSITY
COLL. OXFORD.

[239]

a debt on *T. W.*'s estate, and to be laid out in the purchase of lands and tenements, with the approbation of the Master, pursuant to the articles : and the same was to be settled, with the like approbation, to the use of the Plaintiff *A. W.* for her life, in part of her jointure, with remainder to the Defendant *C. S.* for her life, with remainder in fee to the use of the two senior six clerks, not towards the cause, in trust, and for the benefit of such person and persons as should appear entitled thereto; and to and upon such trusts, &c. as the same ought to be limited, and subject to the directions of the Court ; and, in the mean time, the money, before directed to be laid out in a purchase, was to be placed out at interest on government or real securities, &c. in the name of a trustee or trustees, to be approved of by the Master ; and the dividends and interest thereof were to be paid to such persons as would be entitled to the rents and profits of the lands when purchased. But if the Master should find that the purchased lands were not proper to be settled pursuant to the articles, then the said two sums, making together 11,000*l.* were to be considered as a debt on *T. W.*'s estate, and to be laid out pursuant to the articles, &c. as above-mentioned. And it was ordered, that the manor of Denton, with the lands and premises agreed to be settled by the marriage articles, with the appurtenances, should be settled, with the Master's approbation, to the like uses, and to and upon the like trusts, &c. And the Plaintiff *A. W.* was declared to be entitled to interest, at the rate of 4*l. per cent.* for so much money as ought to have been laid out in the purchase of lands as aforesaid, from the death of her husband.

It

It was ordered, that the testator's house and gardens at Denton, with the appurtenances, and any parcels of land proper to be let therewith; together with the household goods and furniture in the house, should be let to a tenant, with the approbation of the Master, &c. &c. And the Master was to distinguish and apportion how much of the rent ought to be paid for the house, gardens, and lands, with the appurtenances; and how much for the household goods and furniture: and so much of the rent as should be allotted to be paid for the house, gardens, and land, was to be paid to the Plaintiff *A. W.*: and so much of such rent as should be allotted to be paid for the household goods and furniture, should be paid to the Defendant *C. S.*: and an inventory was directed to be made of such household goods, &c. and signed by the said Plaintiff and Defendant, and left with the Master for the benefit of all parties interested therein.

The copyhold lands not surrendered were declared to have descended to the testator's heir at law, and possession thereof was directed to be delivered to him, &c.

The Master was to enquire, whether the regulations indorsed on the testator's will, were consistent with the statutes of the College, or not; and also whether the College had power, at the time of the devise, to take, in Mortmain, the lands and tenements thereby devised to them in remainder; and the Master was to state the same, and all circumstances relating thereto, with his opinion thereon, to the Court, &c. *Reg. Lib.*

It appears that exceptions having been taken to the Master's Report, on account of his having certified,

ATTORNEY
GENERAL
VERSUS
WHORWOOD,
August 2, 1750,
and
WHORWOOD
VERSUS
UNIVERSITY
COLL. OXFORD.

[240]

ATTORNEY
GENERAL
versus
WHORWOOD,
August 2, 1750,
and
WHORWOOD
versus
UNIVERSITY
COLL. OXFORD.

tified, that the regulations indorsed on the testator's will were consistent with the constitutions of the College, those exceptions were allowed on the 13th June, 1755. Vide *Reg. Lib.* 1755. *A. fol.* 609.

The above causes, together with some others on behalf of charities, under this will, coming on before Lord Northington, C. upon the 26th June, 1756, the Court declared, that the regulations indorsed on the codicil were inconsistent with the constitutions of the College; and, consequently, that the trust, whereupon the testator's real estate, and the surplus of his personal estate, were devised and given to the respective Colleges, being void, the devise of the real estate was a resulting trust for the testator's heir at law; and that for the same reasons the bequest of the surplus of the personal estate to the executors, was also void, so far as it related to any interest or benefit thereby given to the Colleges in succession, &c. &c. &c. *Reg. Lib.* 1755, *A. fol.* 607, 609. See moreover 7 Ves. 496, and 1 Schoales and Lefroy Rep. 437.

[241]

VOL. I.

Page 542.

Rolls.

Bequest of residue between two; one of them dying in testator's lifetime, no survivorship, and his moiety is undisposed of. (1)

PRAT *versus* CHAPMAN; August 3, 1750.

(*Reg. Lib.* 1749. *B. fol.* 552.)

NOTES AND OBSERVATIONS.

Owen v. Owen, there cited, is in 1 *Atk.* 494.

(1) See 2 *Ves.* 285; and *Bennet v. Batchelor*, 1 *Ves. jun.* 63.

OATES

OATES *versus* CHAPMAN, August 6, 1750.

VOL. I.

NOTES AND OBSERVATIONS.

Page 542.

THE order was made on consideration four months afterwards. Vide 2 *Vesey* 100.

S.C. 1 Dick. 148.
Et vide 2 *Ves.*

100.
On reversing an order for allowing a demurrer, the costs are to be refunded.

RYDER *versus* BENTHAM, August 7, 1750.

[242]

(Reg. Lib. 1749. B. fol. 532.)

Page 543.

NOTES AND OBSERVATIONS.

(1) SEE *Attorney General v. Bentham*, 1 Dick. 277, in 1755, S. P. and semb. the same Defendant.

Injunction against stopping lights until trial of the right; which was directed on the motion. (1) Court will never on motion make an adverse order to pull down what has been done.

Vide *Gray's Inn Society v. Doughty*, 2 *Ves.* 453. *Fishmonger's Company v. East India Company*, 1 Dick. 163; and *Attorney General v. Nichol*, 16 *Ves.* 338.

It appears from the cases, that the Court will not interfere in many instances in which an action for damages might be maintained.

The interposition of a Court of Equity in such instances is on the principle of preventing material injury amounting to nuisance; and is by no means ancillary to the mere recovery of damages.

See more especially in *Attorney General v. Nichol*, *ubi supra*, and *Attorney General v. Cleaver*, 18 *Ves.* 211.

GAGE *versus* LORD STAFFORD and FURNESS,
August 7, 1750.

VOL. I.

(Reg. Lib. 1749. A. fol. 516.)

Page 544.

As to reference
to the Master
to ascertain
whether two
suits are for the
same matter, or
otherwise.

LORD Eldon C. in *Murray v. Shadwell*, 17 Ves. 353-4, held that such a reference can only be obtained by means of a *plea*, and not by *motion*; saying he could find nothing in support of its ever having been done on *motion*, but the case in *Mosely* 268. It seems his Lordship had overlooked LORD Hardwicke's observations in the principal case, at the top of page 545. Therefore *quære*? Such references in the case of *infants* are quite of course, on the mere allegation of counsel; and the Master is always at liberty to suggest any improvements in the suit, and to report any special circumstances that may be for the infant's advantage. *Sullivan v. Sullivan*, 2 Meriv. 40.

It seems, however, a motion for such a purpose should be on notice, Editor. After the Master's report in favour of one suit, without an impeachment of the other, the costs of the latter will generally be directed to be paid. *Ford or Mortimer v. West* and others, last day of Hil. Term, 1818. 1 *Wilson's Chan. Cases*, 159, and 1 *Swanst. Rep.* 358. S. C.

[243]
VOL. II.
Page 1.

LORD TOWNSHEND *versus* WINDHAM,
July 13, 1750.

(Reg. Lib. 1749. B. fol. 612.)

NOTES AND OBSERVATIONS.

Distinction be-
tween

(1) VIDE *Holmes v. Coghill*, 7 Ves. 499, and
12 Ves.

12 *Ves.* 206. with the cases cited. See also 17 *Ves.* 388. L. TOWNSEND
versus
WINDHAM,

The indenture mentioned p. 1, recited (*inter alia*) that it was made in performance of several promises and agreements "between the parties to that instrument before the marriage of William W. with the Countess of Deloraine, in order that the same might the sooner take effect." July 13, 1760.
tween powers
and absolute
interests. (1)
A general power
of appointment
given over an
estate in lieu of
a present inter-
est in it,
having been
executed volun-
tarily, though
for a daughter,
was held to be
assets in favour
of creditors. (2)

The deed in favour of Catherine, purported to be "in consideration of the natural love and affection her father had for her, and by virtue of the said power reserved to him," &c.

(2) Vide *George v. Milbanke*, 9 *Ves.* 190, and *Holmes v. Coghill*, 7 *Ves.* 499, and 12 *Ves.* 206.

As to the case of *Shirley v. Lord Ferrers*, mentioned p. 2. see the latter part of the note 7 *Ves.* 503.

Bainton v. Ward, cited p. 2, and also reported 2 *Atk.* 172, is stated more correctly in 2 *Vesey*: but that is not quite accurate. It is stated from *Reg. Lib.* 7 *Ves.* 503: from whence it appears that G. W. having power to charge the premises with any sum not exceeding 2000*l.* by his will taking notice of the deed and power, devised to his mother 500*l.*; to the Defendants 1000*l.*; and the remaining 500*l.* to his wife, whom he made sole executrix: and he charged the premises with the said 2000*l.* legacies. The bill was filed by creditors; and the Decree declared "that the sum of 2000*l.*, with the interest thereof, which the said G. W. had power to appoint by virtue, &c. and of which he made an appointment by his will, is to be considered as part of his personal estate, liable to the satisfaction of the residue of his debts." It appears from *Holmes v. Coghill*, 7 *Ves.*

[244]
Tenant for life
assigns rents
and dividends
for 21 years, in
trust to pay a
debt by instal-
ments, the re-
mainder to be
paid to himself;
but if he died
before payment
of all due, then
such rents, &c.
as were due at
that

L. TOWNSHEND
versus
WINDHAM,
July 13, 1750.

that time or should be due at his death, should be applied in satisfaction of the residue, held a specific lien on all the arrears for that debt: and that they were no assets until full satisfaction of it. Wife not entitled to paraphernalia when husband dies indebted. The Court will, however, let her in on other funds, if any. A wife can only claim as a creditor one year's arrears of her separate

[245]
estate; as in the case of pin-money.

Mere power unexecuted in a tenant for life, who becomes bankrupt, does not vest in his assignees.

Vide page 4.

7 Ves. 499, (affirmed on appeal, 12 Ves. 206.) and from the cases therein cited and referred to, that the Court has always maintained the obvious distinctions between a power and absolute property, so as not to interpose against a non-execution of the former; and that the dictum in *Bainton v. Ward*, 2 Atk. 172, is therefore wrong, by being laid down without limitation, and as it is attended with a mis-statement of the case itself; although the same dictum is consistent, if applied to the particular case before the Court, and as confined to cases in which the party has executed or attempted to execute the extent of his power, see 7 Ves. 507, and 12 Ves. 215. It appears therefore upon the whole, that although a Court of Equity will aid a defective execution of a power, it will not supply the want of execution, even in favour of creditors; and that Lord Hardwicke could never have used the dictum above alluded to in the latitude reported: and that the more especially, since his Lordship lays it down expressly in the principal case of *Lord Townshend v. Windham*, that no person could be entitled without an appointment, vide pages 8 and 9.

The instance mentioned p. 3, of a tenant for life, with a power to charge, becoming bankrupt, and that the same being a mere power unexecuted would not vest in his assignees, was also decided by Lord Eldon, C. in *Thorpe v. Goodall*, 17 Ves. 388, and 1 *Rose's Cases in Bankruptcy*, 40.

The assignment to *Comyns*, mentioned at the top of page 4, was of "certain estates to him, his heirs and assigns, during the testator's life, and of certain dividends to *Comyns*, his executors, &c. for 21 years, if the testator should so long live."

"live." The deed also purported to pass, for a like interest, several shares in the New River Water-works.

L. TOWNSHEND
VERSUS
WINDHAM.
July 13, 1750.

The trust was to apply the residue of the dividends, &c. that were due at the time of making the assignment, "*and that should be due and unreceived at the time of his death*, towards satisfaction of the residue of the debt. And in case the arrears should exceed what should be due to *Pratt*, at the decease of the testator, that then the residue thereof, after paying the same, should be applied for the only use of the testator's executors and administrators." *R. L.*

The bill insisted (*inter alia*) that inasmuch as the assignment was made subsequent to a Decree obtained in another suit by the Plaintiffs against the testator [whereby he was excluded from any interest in the New River shares, and ordered to come to an account in respect of them], *Pratt's* security could not stand in the way of their demands, which, by virtue of the Decree, were a prior lien and demand on the said rents, dividends, and premises, to any right which could be derived under the deed, &c. ; and that the deed was obtained with full notice of the Plaintiff's demands. But, if the Plaintiff had not a priority of demand, and if the deed was not fraudulent against them, yet, that the only rents and profits included therein, which did or could pass thereby, were such as should accrue from Lady-day next ensuing the date of the deed, and that there was not the least tendency in the deed to assigning or making any arrears of rent precedent to the execution thereof, or which should accrue before Lady-day 1746, a security for *Pratt's* benefit. That as the testator,

[246]

L. TOWNSHEND
versus
WINDHAM,
July 13, 1750.

had he received the whole arrears to Lady-day, in his lifetime, and after the execution of the pretended deed, could not have been made accountable for the same; neither could his executors *then*, be made answerable for them in any other manner than he would himself have been if living: and that as the pretended deed imported to be no more than a security for 1500*l. per annum*, so the rents which accrued from Lady-day to the time of the testator's death ought to be distributed in the same proportion; and the surplus thereof, at least after answering so much of the annuity as became due in the interval of time aforesaid, to be accounted for to the testator's estate, in the same manner as it would have been to himself had he lived to receive the same.

The Defendant *Pratt* stated (*inter alia*) that the said Decree for an account obtained by the Plaintiff was no lien on the arrears of rent, dividends, and profits of the premises, and that the indenture was executed before such account was liquidated by any report or agreement.

[247]

His Lordship declared "that the said Defendant *J. Pratt*, and the Defendant *S. Comyn*, as "his trustee, are entitled to have the arrears of "rent of the estate, and the arrears of the dividends of the New South Sea Annuities incurred "and due at the time of the death of the said "testator, comprised in the said indenture, over "and above the 1500*l. per annum*, specially provided by the said indenture, applied towards "satisfaction of the demands of the said Defendant *J. Pratt*, and that the same ought not to be "considered as part of the general assets of the "said testator." *R. L.*

As

As to the instances stated at bottom of page 9, see *George v. Milbanke*, 9 *Ves.* 190, and *Holmes v. Coghill*, 7 *Ves.* 499, and 12 *Ves.* 206.

(1) *Vide* pages 10 and 11, and *Stephens v. Olive*, 2 *Bro.* 90, &c. *Couper* 710, 711. 1 *Atk.* 15. 94. *Beaumont v. Thorpe*, 1 *Ves.* 27. *Lush v. Wilkinson*, 5 *Ves.* 384, &c. (as to which see *per* Sir *William Grant*, M. R. 12 *Ves.* 155.) *Brown and Carter*, 5 *Ves.* 862. *Kidney v. Coussmaker*, 12 *Ves.* 136, and the cases there cited; especially *Montague* and *Lord Sandwich*, with the note on it there, p. 156.

(2) The 13th *Elizabeth* was made in favour of *creditors*.

The 27th *Elizabeth* in favour of *purchasers*.

See moreover, 1 *Ves.* 27, and 2 *Ves.* 18.

force of the stat. 27 *Eliz.* c. 4. (1) Difference between the c. 5, and the 27 *Eliz.* c. 4. (2)

L. TOWNSHEND
versus
WINDHAM,
July 13, 1750.

Voluntary conveyance by a person indebted at the time, void against subsequent purchasers for valuable consideration, and creditors.

If the party is not indebted at the time, and no fraud, it is good against creditors, though not against purchasers; by

statutes 13 *Eliz.*

BOUGHTON versus BOUGHTON, July 18, 1750.

(*Reg. Lib.* 1749. A. fol. 599.)

[248]

VOL. II.

Page 12.

NOTES AND OBSERVATIONS.

AFTER the bequest to the residuary legatees, stated in the report as the end of the will, these words appear in *Reg. Lib.* "liable only to orphanage. His will being, that the contestor not content with the whole will, should account for all monies which the testator had advanced him or her."

(1) *Vide* *Shedden v. Goodrich*, 8 *Ves.* 481. 496, and the note to *Allen v. Poulton*, antea (76).

Election—Will purporting to give a real estate to A. but not executed agreeably to the statute, giving (inter alia) a contingent legacy to an infant (who became the testator's

BOUGHTON
versus
BOUGHTON,
July 18, 1750.

tor's heir at law), and expressly directing, that if any who received benefit by the will should dispute any part of it, they should forfeit all claim under it. Held that the infant heir should elect when he came of age. (1) In the mean while A. the intended devisee, was allowed to be in possession of the estate, (2) though restrained from committing waste, and subject to account; as to which, his share of the personal estate was declared liable to make satisfaction.

The Decree in the principal case appears in *Reg. Lib.* as follows.

"Whereupon, &c. his Lordship doth declare, "That the said testator's will is not executed in "such manner as is sufficient to pass his real estate, "and therefore the same is descended to the Defendant *G. B.* his grand daughter, and heir at law; but that according to the clauses, conditions, and terms contained in his will, the said Defendant *G. B.* is not entitled in this Court to claim the benefit both of the lands descended to her and the legacy of 1200*l.* given to her by the will upon the contingencies and terms therein mentioned, and the said 1200*l.* being a contingent legacy, no election can be made for her during her minority: therefore his Lordship doth order and decree, that the Defendant *G. B.* when she shall attain her age of twenty-one years, do make her election, whether she will insist to take and enjoy the lands so descended to her as aforesaid, or will part with the same, and abide by her said legacy of 1200*l.* given her by the said will; and in case she shall make her election to take and enjoy the lands so descended to her as aforesaid, then his Lordship doth declare, that the said legacy of 1200*l.* and all the interest and benefit that she can take thereby, ought to fall into the *residuum* of the said testator's personal estate. But in case she shall then elect to abide by the said legacy of 1200*l.* given her by the said will, in that case his Lordship doth order and decree, that the said Defendant *G. B.* after she shall have attained her age of twenty-one years, and made such election as aforesaid, do convey the said

"lands

“lands to the Plaintiff for life, with such limitations over as are mentioned in the said will.
“But in the mean time, and until the said Defendant *G. B.* shall attain her age of twenty-one years, and make such election, or marry with such consent as is directed by the said testator’s will before such age; it is further ordered, that the several sums appointed by the said testator’s will for the maintenance of the said Defendant *G. B.* the infant, to be computed from the time of the death of the said testator, be paid to *M. B.* the mother of the said Defendant *G. B.* the infant, by whom she has been maintained, and for the future during such time as she shall maintain her. And it is further ordered, that the Plaintiff be let into possession and receipt of the rents and profits of the lands in question, subject to the further order of this Court; and that the Plaintiff be restrained in the mean time, from committing any waste upon the said real estate; but these directions concerning the payment of the maintenance, and the Plaintiff’s receiving the rents and profits of the said estate as aforesaid, are to be without prejudice to any of the parties, and subject to the further order of this Court; and in case the Defendant *G. B.* shall make her election to take and enjoy the lands in question, or any of the contingencies whereupon the said 1200*l.* is given over, shall happen before she makes such election, then, &c. that whatever the Plaintiff shall be entitled to as his orphanage part of the said testator’s personal estate, will be liable to make satisfaction for what he shall have received out of the rents
“and

BOUGHTON
versus
BOUGHTON,
July 18, 1750.

BOUGHTON
versus
BOUGHTON,
July 18, 1760.

“ and profits of the said testator’s real estate, as
“ the Court shall direct,” &c. *Reg. Lib.*

(2) The Author of these notes *almost* ventures to doubt the propriety of this. The only ground on which it could be rightly done, would be the *greater benefit to the infant in the mean while; and this of course, must be presumed* from so great, so impartial, and careful, a Judge. It is, however, *certain*, that the *legacy was contingent; and that the report does not at all notice such greater benefit to the infant in the mean while.*

The implication from thence would be rather to the contrary; the Lord Chancellor being stated to observe, “ *that the Master could not judge for the infant on account of the legacy being in several contingencies;*” and to say only “ that the Plaintiff ‘ *must*’ receive the rents, &c. till the election made, subject,” &c.

Independently of the benefit actually supposed to arise to the infant in such a case, the Author is aware of no principle, empowering the Court to take the intermediate possession of the real estate away from the infant heir, who was manifestly entitled to it at Law, and in Equity, and to give it to one who was as manifestly not entitled to it; and who had but a precarious equitable chance of having the estate at a future period, if the infant, then ceasing to be an infant, should chuse to abandon it to him.

The Author is the more anxious on the subject, because it appears clearly that the real estate could not *specifically* be affected even by any *possible implication*. The only obligation imposed by the will, was a *forfeiture of the legacy, by an express condition; and this could only subject a party to*
take

take, or reject, the benefit, subject to the alternative, when he was competent to make his election. This is the precise point; and its extent; as to which, see per Lord Eldon, C. in *Sheddon v. Goodrich*, 8 Ves. 496, 497; and the distinction as taken from the cases in the note to *Allen v. Poulton* (1 Ves. 122) *ante* 76. If, therefore, the will could not be looked at, so as to operate directly on the land, (and nothing could affect the land, either at Law or in Equity, till the minority had ceased, when the party seised of it, would determine for himself, whether any thing should ever affect it at all; how was it competent for a Court of Equity to divest the possession from the infant, or the receipt of the rents and profits from his guardians in the mean while?

BOUGHTON
versus
BOUGHTON,
July 18, 1760.

It is to be noticed that Lord Kenyon, when M. R. said that he could not find himself warranted in agreeing with this case; though he confessed his powers of discrimination were far inferior to those possessed by Lord Hardwicke. From the MS. notes of Sir Samuel Romilly. Vide Mr. Bell's note to his edition of *Brown*, 2 vol. 59. In note (a) to 1 *Swanston Rep.* 414.

Mr. Swanston, after referring to the above observations of the Editor, suggests, that possibly Lord Hardwicke's order proceeded on the notion that the disposition of the will should not be disturbed, except by actual election to take against it; and that any inconvenience consequent on the suspension of election, ought to affect the individual alone, by whose disability it was occasioned. Mr. Swanston then refers to 2 Ves. jun. p. 697. Upon the doctrine of election in general, see some very elaborate notes by Mr. Swanston, in *Dillon v. Parker*,

BOUGHTON
versus
BOUGHTON,
July 18, 1750.
[250]

Parker, and Gretton v. Howard, 1 *Swanst.* 359 to 457, with reference to infants, &c. See in particular, 1 *Swanst.* note to p. 413, &c.

As to the Court never allowing an infant's estate to be prejudiced, see *per Lord Hardwicke, C.* in *Taylor v. Philips*, 2 *Ves.* 23. *Noys v. Mordaunt*, cited p. 12, is in 2 *Vern.* 581. *Prec. Ch.* 265. *Gilb. Rep.* 2.

Jenkins v. Jenkins, cited also p. 12, is likewise stated in p. 617 of the same volume.

As the Author of these notes has a MS. Note of that case, he thinks its insertion may be serviceable to the profession.

JENKINS v. JENKINS, in Canc. Mich. 10 Geo. II.
November 20, 1736.

David Lewis by will, dated November 22, 1699, gave to his granddaughter *Anne Jenkins* 300*l.* to be paid her within five years after his decease, and to the other four children of his daughter *Eleanor* (being his four grandsons) he gave 200*l.* a piece, to be paid them within 5 years after his decease; and declared that no interest should be charged for either of the last mentioned sums to the appointed time of payment, and then the said last sums to be put to interest for the said children, by their father and mother, and the survivor. And also declared his intent to be, that in case any of the said children should die before such legacy became due, that then the legacy of such so dying should go amongst the brothers and sisters of the whole blood of such child, share and share alike; and made his son-in-law, *Thomas Jenkins* (husband

band to his daughter *Eleanor*) executor, and died
 *the 29th of the same month. *Eleanor*, the testa-
 tor's daughter, had then five children besides the
 said *Anne*, viz. *David Jenkins* the elder, the Plain-
 tiff, the second *John*, *George*, and *William*. *Anne*
 died June 10, 1700; and *Eleanor* had another
 child, viz. the Defendant, since the death of *Anne*,
 but before *Anne's* legacy became payable. *Thomas*
Jenkins, the executor, expended 110*l.* in placing
 out the Plaintiff to apprenticeship, and paid sever-
 al debts of his, and maintained him after he came
 to age, and by his will in writing, in 1731, de-
 vised as follows: "Whereas I am executor to my
 "late father-in-law, *David Lewis*, who by his will
 "gave my son *Thomas Jenkins* 200*l.* to be paid
 "him as by the said will is mentioned; and there
 "being also due on the death of his sister *Anne*
 "50*l.* which I am by the said will obliged to pay,
 "I do therefore, in discharge of my said executor-
 "ship, and out of affection to my said son *Thomas*,
 "give the said 250*l.*, notwithstanding I paid 110*l.*
 "thereof, to place him apprentice, and have
 "maintained him with all manner of necessaries,
 "and have paid for him at his request upwards of
 "200*l.* in discharge of his debts, and have main-
 "tained him these 20 years, for which payments,
 "charges, and expences, I insist upon no more
 "than the interest of the 250*l.*, and do give him
 "the said 250*l.* notwithstanding the charge I have
 "been at, and the payments and disbursements I
 "have made as aforesaid, to be paid him by my
 "executor within six months after my death, and
 "I give the interest of the said 250*l.* to my execu-
 "tor, in satisfaction of the money by me paid, laid
 "out, and expended, for my said son *Thomas Jen-*
 "kins,

BOUGHTON
 versus
 BOUGHTON.

Jenkins.
 versus
Jenkins.

[*251]

BOUGHTON
versus
BOUGHTON,
—
Jenkins
versus
Jenkins.
[*252]

*“ *kins*, and I do enjoin my said executor to take “ the said sum, and no more, in satisfaction there- “ of.” He then gave the Plaintiff all sums that were due to him from one *Pryce*, who afterwards became insolvent; and further devised to him a close in fee; and made the Defendant executor and residuary legatee.

The Plaintiff brought the bill for the 250*l.* and interest for five years after the death of *David Lewis*; and the Defendant in his answer, insisted that the Plaintiff ought to submit to the whole will of his father, and not take advantage of it in part, and avoid it in the other part.

The cause was first heard at the Rolls, when it was decreed that the child, which was born after the testator *Lewis's* death, and before the legacy of 300*l.* became payable to *Anne*, was entitled to a share with the other children; and likewise that the Plaintiff was entitled to interest, as well for the 50*l.* which came to him upon *Anne's* death; as for the 200*l.* devised to him by *Lewis*, and likewise to the land and money left him by his father *Thomas Jenkins*.

The question now was, whether the Plaintiff was entitled both to the interest of the legacy of 250*l.* and also to what was devised to him by his father, or whether his father's will should not be taken as a satisfaction for it.

Lord Chancellor [*Talbot*].—

As to the general demand, the Plaintiff is en- titled to the principal; but the question is, whether he hath not received a satisfaction for it by the money expended upon him by his father in his lifetime: as on the one hand parents are bound to maintain their children, where the

children have no subsistence of their own ; so, on the other, where the child hath an annual income, the parent is not bound to let that accumulate, and maintain the child out of his own pocket, but may apply that income to the child's maintenance. In the present case, the child hath but 250*l.* in the whole, whereas the father had a good real and personal estate ; and if what is sworn by one witness be true, the father had, in the year 1730, promised to pay both principal and interest, and to assign an estate by way of security for the growing interest ; which shews no intent to set up so hard a demand against his child, whose fortune was so small in comparison of his own ; and though he was persuaded afterwards to alter his opinion, and to revive his demand, yet, having been before waived by the transaction in 1730, he should not now be at liberty to revive it ; so that if the case stood upon that point alone, I should make no difficulty of relieving the Plaintiff. But then comes the will, whereby the father might impose what terms he pleased upon his own disposition, according to the rule in *Noys v. Mordaunt's* case, 2 *Vern.* 581, which is applicable to the present one ; it being unreasonable to take a will by halves, and not to be supposed, that the testator would have made the bequest, had he known that the terms upon which he made it would not be complied with. In the present case, the testator never intended that the Plaintiff should have this interest, and likewise take advantage of the devise of the close, and of the sum given him ; and I do not think there is any difference, where the devise is of money only, and where it is partly of money, and partly of land. In *Noys v. Mordaunt's*

BOUGHTON
versus
BOUGHTON.
—
Jenkins
versus
Jenkins.

BOUGHTON
versus
BOUGHTON.
—
Jenkins
versus
Jenkins.

daunt's case, although land was by the will given in satisfaction of land, which might be said to differ it from ~~this~~ case; yet the land was of a different nature, which brings it to the same thing as it is here.

And so reversed the Decree, and decreed, that the Plaintiff do make his election, whether to take under the will, and to wave the interest of the 250*l.*; or to have the interest, and waive the advantages of the devise.

Herle v. Greenbank, cit. p. 13, is in 1 *Ves.* 290, and 3 *Atk.* 695.

Brudenell v. Bowton, stated p. 16, is in 2 *Atk.* 268; from whence it appears, that the operation of the codicil was considered *as only a lessening of the quantum* given by the will, though differently modified. Vide *ibid.* p. 273.

VOL. II.
Page 16.

WARD *versus* SHALLET, July 26, 1750.

(No Entry.)

NOTES AND OBSERVATIONS.

Settlement after marriage, on wife, &c. good against the husband's creditors and assignees, having been made in consideration of her parting with

(1) VIDE *Beaumont v. Thorpe*, 1 *Ves.* 27, *et antea* 25.

Blackerby's case, cit. p. 17, is in 1 *Ves.* 347.

Fitzer v. Fitzer, cit. *ibid.*, is in 2 *Atk.* 511.

As to Miss *Windham's* case, cit. p. 18, and the observations, see pp. 10 and 11 of the vol. with the notes on it, *antea* (247).

As

*As to the case put by the Lord C. p. 18, of the advance of a *new portion*, raising a good consideration, see also *Ramsden v. Hylton*, &c. p. 308 of the vol. *et post.* (350).

WARD
versus
SHALLET,
July 26, 1750.
[*255]
with a contin-
gent interest se-

cured by the bond of the husband to her before the marriage without the interposition of trustees. (1)

COXE versus BATEMAN, August 1, 1750.

(Reg. Lib. 1749. A. fol. 620.)

VOL. II.

Page 19.

(1) SEE *Vernon v. Vawdry*, 2 Atk. 119, and *Barn. Chan.* 280 : likewise in *Lansdowne v. Lansdowne*, 1 Madd. Rep. 138, 139. Remedies for a breach of trust is personal ; and money produced thereby laid out on an estate in Ireland, cannot be specifically followed. (1) The party's assets were, however, marshalled in favour of the claim.

CLAVEY versus HUNT, August 1, 1750.

Page 19.

NOTES AND OBSERVATIONS.

Twine's case there cited is in 3 Rep. 80.

A deed may be evidence of an act of bankruptcy, though made in favour of creditors.

[256] TRAVERS, &c. EXECUTORS OF LORD POWIS,
VOL. II. *versus* EARL STAFFORD, and MR. FURNESS,
Page 19. October 15, 1750.

S.C. Ambl. 104.

(Reg. Lib. 1749. B. fol. 610.)

NOTES AND OBSERVATIONS.

If injunction be dissolved on the merits, another cannot be obtained, as of course, on an amended or supplemental bill. (1)
The injunction having issued irregularly, held the Defendant had not waived the objection by a mere application for time to answer the bill. Objections as to irregular process can only be waived by a party doing some act expressly founded on it, or amounting to a clear affirmance.

(1) VIDE *Bliss v. Boscawen*, 2 Ves. and *Beames* 101. and *James v. Downes*, 18 Ves. 522.

It appears evidently from thence (as intimated by Lord *Hardwicke*, page 21), that the Court does not hold a Plaintiff to the strictness of stating the full strength of his case at first, without lending its assistance by injunction, on amended or supplemental bill.

The distinction is, that *the case, as well as the motion, must be special.*

(2) Vide page 21. *Sed quere*, whether it would supersede a clear mistake in law; see *Ching v. Ching*, 6 Ves. 282. *Young v. Walter*, 9 Ves. 364, and *Steff v. Andrews*, 2 Madd. Rep. 6; and whether the Court, in such a case, would not hear such objections, as it does arguments against the Reports of its Masters; or as it re-hears, or reviews, its own Decrees.

Award. The result of a reference under an order of the Court, viewed by the Court as a Decree; and even stronger, since it supersedes all errors but corruption or partiality. (2)

ANONYMOUS,

ANONYMOUS, October 15, 1750.

NOTES AND OBSERVATIONS.

(1) It was held, in *Ratcliffe v. Roper*, 1 P. W. 420, that where a party's clerk in Court was dead, no process could be taken out against him, until he had appointed a new clerk in Court; and that a *subpœna ad faciend. attorn.* must be taken out for the purpose; the service of which, he absconding and denying himself, would be good if left at his house. And it seems now settled by *Franchlyn v. Colhoun*, 12 Ves. 2, and *Shillabar v. Langdon*, therein cited and stated from the Registrar's book by the Master of the Rolls, that where a party is avoiding service, and the clerk in Court is dead, the proper course is to move that service of a subpœna to name a clerk in Court may be good service, when made on the party's solicitor.

Though personal service is in general requisite, as a foundation for bringing a party into immediate contempt for non-compliance with a decree or order of the Court, it is yet dispensed with under particular circumstances; as in respect of a short order, after a party has had notice of the Decree. *Rider v. Kidder*, 12 Ves. 202. Or where a party declared he would not execute an order, and absconded to avoid it. *De Munneville v. De Munneville*, *ibid.* 203. It is to be noticed, in respect of a passage referred to in the last case, p. 205, on the authority of the Practical Reg. as to service of a writ of execution on the clerk in Court being good service, where the party was not to be found,

[257]
VOL. II.
Page 23.

Orders for service of process discretionary.

(1) Where neither the party, nor her Clerk in Court, could be found, the Court ordered that the service of a subpœna to hear judgment, on her solicitor, should be deemed good service, if accompanied by a copy of the order left at the last place of abode.

[258]

ANONYMOUS,
Oct. 15, 1750.

found, that notwithstanding what is said in *Ellison* and *Pickering*, 8 *Ves.* 319, as to the want of any particular instance of this practice, it was allowed to be the course in *Ratcliffe v. Roper*, *ubi supra*; and that *Edwards v. Poole*, mentioned by the Lord Chancellor in the subsequent case of *De Manneville*, is an authority in point. See 12 *Ves.* 205, note (b.)

As to the service of subpoenas to answer in cases of absconding, see *Wyatt's Prac. Reg.* 402; *Sir W. Pulteney v. Skelton*, 5 *Ves.* 147 and 260, note; and *Hunt v. Lever*, *ibid.* 147.

As to service of an order of sequestration, *nisi*, on the party's clerk in Court being good, see *Marq. of Lothian v. Garforth*, 5 *Ves.* 113.

VOL. II.

Page 23.

Vide S.C. 1 *Ves.* 229, 230. et *antea.* (119)

An infant's inheritance never bound by acts of the Court. As to a surrender of copyhold estate by feme covert, with her husband's privity and consent, but without his having actually joined in the act. (1)

[259]

TAYLOR *versus* PHILIPS, October 17, 1750.

(*Reg. Lib.* 1749. B. fol. 606.)

NOTES AND OBSERVATIONS.

(1) SEE the former stage of this cause, where the points were raised, 1 *Ves.* 229, and 230, and the note thereon, *antea* 119.

It having been then referred to the Master to examine into the proposal of Sir N. *Edwards*, there stated, and to consider whether it was reasonable and for the infant's benefit, &c.; he accordingly certified, that he found, upon searching into the Court Rolls of the several manors, that instances appeared therein of *feme coverts* having made surrenders of their copyhold estates without their husbands actually joining with them in such surrenders: and that there were also many instances therein

therein of *femes covert* making surrenders jointly with their husbands; whereby it appeared to be doubtful, whether the surrender, which had been made in the case before him by *J. P.* without her husband's joining therein, was good or not: and it appearing to him that Sir *N. E.* was elderly and unmarried, and that the infant was his only next of kin, he was therefore of opinion, upon considering the whole matter, that the said proposal was reasonable, and for the infant's benefit, to have the same carried into execution.

TAYLOR
versus
PHILIPS,
Oct. 17, 1750.

The causes coming on as above, upon that Report, and for further directions, &c. the Report was confirmed, and the proposal therein stated [as to which see *antea, ubi supra*] ordered to be carried into execution, with the variations following; *viz.* "That *the surrender* to be made by the " said Sir "*N. E.* be made to the uses therein-mentioned, "*on condition* that *J. T.* the infant, do, when he "*shall attain his age of 21 years, confirm the es-* "*tate for life, to be limited to Sir N. E. by the* "*surrender to be made of the copyhold premises.* "*And this order is to be without prejudice to the* "*Plaintiff, the infant, after he shall attain his age* "*of 21 years."* *Reg. Lib. ubi supra.*

Mr. *Chetwynd's* case, mentioned in page 23, is that of *Chetwynd v. Fleetwood*, 1 Bro. P. C. 300, octavo edition.

[260]
VOL. II.
Page 24.

FENHOULET *versus* PASSAVANT,
October 17, 1750.

(Reg. Lib. 1749. A. fol. 687.)

NOTES AND OBSERVATIONS.

Reference for scandal may be at any time ; not so as to mere impertinence. Scandal includes impertinence ; but a matter may be impertinent without being scandalous. Nothing scandalous that is strictly relevant to the merits.

(1) THE exceptions were accordingly overruled.
R. L.
As to the above point, see *Coffin v. Cooper*, 6 *Ves.* 514 ; *Lord St. John v. Lady St. John*, 11 *Ves.* 526, &c. ; and per Lord *Eldon*, C. 15 *Ves.* 477. Vide also *Anon.*, 2 *Ves.* 631, *et postea* 431.

Page 24.

MELIORUCCHY *versus* MELIORUCCHY,
October 19, 1750.

S. C. 1 Dick.
147.

(Reg. Lib. 1749. B. fol. 496.)

NOTES AND OBSERVATIONS.

If Plaintiff is abroad, and the Defendant becomes apprized of it, he cannot obtain security for costs, if he afterwards takes any other step in the cause ; such as applying for time to answer, &c. (1)

SEE acc. *Craig v. Bolton*, 2 *Bro.* 609 ; *Anon.* 10 *Ves.* 287, and *White v. Greathead*, 15 *Ves.* 20.
The mere fact of the Plaintiff having gone abroad, is not a sufficient ground for the Court to grant security for costs. *Hoby v. Hitchcock*, 5 *Ves.* 699.
As to some other points on this head, see *Anon.* 1 *Ves.* jun. 409. *Green v. Charnock*, *ibid.* 397. *Seilax v. Hanson*, 5 *Ves.* 261 ; *Ogilvie v. Hearne*, 11 *Ves.* 598 ; and *Gage v. Lady Stafford*, 2 *Ves.* 556, 557.

E.

Ex parte WRIGHT, October 20, 1750.

NOTES AND OBSERVATIONS.

IN administering the lunatic's funds, &c. the Court never considers the next of kin, *if their presumptive rights interfere in the least degree with the lunatic's comfort or convenience.* Vide the note to *Owen v. Davies*, *antea* (61), which cites 2 P. W. 262, 265; 1 Ves. jun. 296; 2 Ves. jun. 72; and 6 Ves. 8. Vide *etiam ex parte Whitbread*, 2 Merivale, 99, 101, &c.

Even for creditors the Court will not make an Order, which will have the effect of reducing the lunatic to absolute want. *Ex parte Dikes*, 8 Ves. 79.

[261]
VOL. II.

Page 25.

In passing accounts of a lunatic's estate, notice should be given to the parties next entitled; but they are not allowed any costs. (1) Lunatic's comfort considered in exclusion to the presumptive rights of his next of kin, &c. Lunatic not strip of support by act of the Lord Chancellor even for creditors.

ANONYMOUS, October 22, 1750.

Page 25.

NOTES AND OBSERVATIONS.

(1) *See Taylor v. Lewis*, 2 Ves. 111; and the note to it, *postea* 290.

Voluntary release by a party to his adversary not to defeat the debt in Court (1) of his lien for costs. If the suit had ended on a *bonâ fide* compromise for a reasonable consideration paid, it would have been otherwise.

[262]
VOL. II.

Page 27.

BLINKHORN *versus* FEAST, Oct. 24, 1750.

(Reg. Lib. 1750. A. fol. 104.)

NOTES AND OBSERVATIONS.

S.C. Wils. 225.

Residue undisposed of held vested to executors beneficially, and no resulting trust for the next of kin, although the executors had legacies given them. In this case the executors were infants, and the legacies specific, distinct, and unequal.

(1) THE testator gave the infant executors respectively, distinct parcels of his freehold and copyhold estate; the share of one appearing considerably larger than the other: to the former also he gave all the household goods that were in the house wherein he dwelt, and a mortgage of 60*l*. To the others he gave two mortgages; the one of 250*l*.; the other of 60*l*.; together with different sums of 40*l*. 20*l*. and 18*l*. due from other people, and appointed them joint and sole executors, &c.

Reg. Lib.

It seems quite true that Lord Hardwicke entertained a doubt as to the admissibility of the parol evidence in the principal case. See *per M. R.* in *Clennell v. Lewthwaite*, 2 *Ves. jun.* 473; *et per* Lord Chancellor, *ibid.* 647. See further as to points in the argument of the principal case, &c. &c. from Lord Hardwicke's notes of it, *ubi supra*, 2 *Ves. jun.* 647.

As to these questions between executors and next of kin, see 1 *Ves.* 91, 162, 166, and 495; and also Mr. Raithby's note to *Foster v. Munt*, 1 *Vernon* 473. See likewise *Roper on Legacies*, 2 vol. 492, &c. in which, (as well as in some of the cases, it is observed, with great reason, to be questionable, whether the interference of Courts of Equity, in preventing executors from deriving any

any benefit from their *legal* rights, has not been attended with greater inconvenience to society, from the multiplicity of suits, and the uncertainty and intricacy of the law upon the subject, than would have been the case, if the plain legal rule had been allowed to prevail generally, and without exception. See also *Langham v. Sanford*, 17 *Ves.* 435, &c. Affirmed on Appeal by Lord *Eldon*, C. 14 Nov. 1816, 2 *Merivale*, 6.

BLINKHORN
versus
FEAST,
Oct. 24, 1750.

On the subject in general, and as to a difference of opinion between the present Lord Chancellor (Lord *Eldon*) and the Master of the Rolls (Sir *William Grant*), see the case of *Gibson v. Clarke*, on appeal, 18 *Ves.* 247, &c. 252, 253-4-6, and 257, *note*; and *Southouse v. Bate*, 2 *Ves.* and *Beames*, 396, 398, 399.

[263]

Buffart v. Bradford, cit. p. 28, is in 2 *Atk.* 220.

Foster v. Mount, cit. p. 29, is in 1 *Vern.* 473.

Vide particularly the note on it by Mr. *Raithby*. *Foster v. Munt* is said to have been the first determination that executors, where there was no disposition of the residue, were trustees for the next of kin: yet see towards the end of Mr. *Raithby's* very useful and elaborate note on 1 *Vern.* 473.

In the principal case, an issue, *devisavit vel non*, was directed as to the real estate. As to which, see 1 *Dick.* 153.

EAST versus COOK, October, 30, 1750.

(Reg. Lib. 1750. A. fol. 91.)

VOL. II.

Page 30.

NOTES AND OBSERVATIONS.

- (1) EAST had received this legacy of 1000*l.* and A bequeaths
had 1000*l.*

**EAST
versus
COOK,**

Oct. 30, 1750.

1000*l.* to such children as his daughter should leave at her death. B. her husband, receives it; and by

[264]

his will, reckoning that A. had promised to give it (rather differently), but that he B. was nevertheless desirous to make good A.'s intent and will, bequeaths it equally between his sons C. and D. D. alone, survives his mother. Held, that C.'s representatives were not entitled; and that A.'s will would have prevailed, even if B. had intended to make a variation.

Election.—

Legacy in lieu of things expressed, shall not put the party to an intent that

had invested it, with a further sum, in the purchase of 1000*l.* Bank Stock.

William survived his father, who had given him a large residue, and made him sole executor, but died before his mother, leaving the Defendant *Cook*, and another, his executors.

The daughter was still living; and a Defendant to the bill. She admitted she had released her rights, in consideration of her father having settled 10,000*l.* upon her marriage.

The other Defendants insisted, that the father became, for the above reason, a purchaser of his daughter's interest; and that, therefore, they, as the executors of *William*, his executors, &c. ought to stand in her place, and were entitled to her share.

They likewise submitted, that the Bank Stock, having been purchased, with other monies, of the father, added to the 1000*l.* bequeathed by *Gough*, and being then of the value of about 137*l.* per cent. the Plaintiff could only be entitled to a proportionable part of the 1000*l.* in money, unless he would accept of one half of the Bank Stock, as given him by his father, in full satisfaction of his claims.

The Decree was however made for a transfer to the Plaintiff of the whole of the Stock. See the Judgment.

to his election as to another benefit; though it may be contrary he should take both.

PEARCE *versus* CHAMBERLAIN

Oct. 30, 1750.

(*Reg Lib.* 1750. *B. fol.* 588.)

VOL. II.

Page 33.

NOTES AND OBSERVATIONS.

Barter v. Burfield, cit. p. 34, and mentioned at top of p. 35, is in 2 *Stra.* 1266.

(1) Per Lord Eldon, C. in *ex parte Williams*, 11 *Ves.* jun. 5. "The representatives of a deceased partner, or the assignees of a bankrupt partner, are not strictly partners with the survivor, or the solvent partner; but still, in either of these cases, such a community of interest remains as is necessary, until the affairs are wound up; and as requires, that what was partnership property before, shall continue for the purpose of a distribution, not as the rights of the creditors, but as the rights of the parties themselves require. It is through the operation of administering the equities, as between the partners themselves, that the creditors have that opportunity; as, in the case of death, it is the equity of the deceased partner that enables the creditors to bring forward the distribution." See also *Crawshay v. Collins*, 15 *Ves.* 218.

A correct report of *Huddleston's* case, cited in this Report, p. 35. will be found in the note to 1 *Swanston's Rep.* 514. For some observations upon it and the points in general, vide *Sayer v. Bennet*, 1 *Cox. Ca. Ch.* 107, 109. et per Lord Eldon, C. in *Waters v. Taylor*, 2 *Ves.* & *Beam.* 302, 303, &c. with the cases referred to.

Articles of Partnership do not survive for the benefit of executors, &c. without an ex-

[265]

press provision for such purpose. (1)

Same as to assignees of a bankrupt.

Rights, as between the parties in such instances; and through them the rights of their creditors.

THORNE

VOL. II.

Page 35.

THORNE *versus* WATKINS, Oct. 30, 1750.

(Reg. Lib. 1750. B. fol. 138.)

English subject resident and dying in England, where his will was proved, but having debts and choses in action in Scotland, held, that the latter was distributable as the rest of his effects. (1)

Debts follow the person of the creditor, not of the Debtor.

As to debts due to a freeman of London. (2)

NOTES AND OBSERVATIONS.

(1) SEE *M. Anandale v. March'ss of the same*, 2 *Ves.* 381 ; another branch of that cause, *Ambler* 80, and *Bempde v. Johnstone*, 3 *Ves.* jun. 198. See also in particular, *Somerville v. Lord Somerville*, 5 *Ves.* 750, with the cases there cited; especially *Balfour v. Scott*, *Dom. Proc.* *ibid.* p. 754.

(2) "Debts due to a freeman of London *any where*, are distributable according to the custom." Per Lord *Hardwicke*, C. p. 37. See also *Cholmley v. Same*, 2 *Vern.* 82.

Pipon v. Pipon, cited p. 37, is in *Ambler* 25.

[266]
Page 37.ALLEYN *versus* ALLEYN, Oct. 31, 1750.

NOTES AND OBSERVATIONS.

Satisfaction—Devise of the residue of real and personal estate for life, held not to be a satisfaction for a sum articulated to be laid out in lands. (1)

(1) VIDE *Barret v. Beckford*, 1 *Ves.* 519, and the note on it, *antea*, (219).

Upton v. Prince, cited p. 38, is in *Forr.* 71.

GLYNN *versus* BANK OF ENGLAND,
November, 3, 1750.

VOL. II.

Page 38.

(Reg. Lib. 1750. A. fol. 46.)

NOTES AND OBSERVATIONS.

(1) SEE the same point determined in *Walmsley v. Child*, 1 *Ves.* 341. Et vide the notes on that case, *antea*, (163). Note, however, the distinction made in *Lefebure v. Worden*, 2 *Ves.* 54. &c.

The case of *Serle v. Lord Barrington*, cited p. 40, is in 3 *Bro. P. C.* 593, octavo edition.

(2) See *Walmsley v. Child*, 1 *Ves.* 345, and the notes thereon, *antea* (163); also 15 *Ves.* 338.

(3) See page 42, 1 *Ves.* 66, 97, 125, and the note, *antea*, (50), to *Le Neve v. Le Neve*, 1 *Ves.* 66.

(4) Vide *Gosse v. Tracy*, 2 *Vern.* 699, and 1 *P. W.* 287; *Haws v. Hand*, 2 *Atk.* 615.

Brograve v. Winder, 2 *Ves.* jun. 634; and *Pryse v. Lloyd*, 2 *Ves.* 374, et *antéa* (210).

Although it is stated, page 43, that there was "no instance where entries made by a party had been admitted as evidence, after any length of time;" this means, they had not been admitted as original substantive evidence of a fact; and not that they were always to be excluded; since it appears from *Lefebure v. Worden*, 2 *Ves.* 54, post. 270, that they may be allowable evidence of a claim actually made, &c. &c.

Bill by executors on loss of notes mentioned in a list written by the testator.

Such a list not of itself evidence of the property, but left to be tried at law. (1) As to the difference of proceeding in equity or at law on lost instruments; want of proof of bonds &c. (2)

No Decree for a Plaintiff in equity on the

[267] evidence only of one witness in contradiction to Defendant's positive answer. (3)

The testimony of a witness read if he was indifferent when examined, though becoming interested afterwards. (4)

ATTORNEY

VOL. II.

Page 44.

Rolls.

Sir. J. Strange,
M. R.ATTORNEY GENERAL *versus* MEYRICK.

November 6, 1750.

NOTES AND OBSERVATIONS.

Devise to a charity by mortgagee in possession of all monies due on his securities, is within the mortgage act, 9 Geo. II. c. 36. (1) So likewise of turnpike tolls, and money on security of poor's rates and county rates.

(1) VIDE *S. P. Attorney General v. Caldwell*, *Amb.* 635; *Pickering v. Lord Stamford*, 2 *Ves.* jun. 272, 279, and 581; and in 3 *Ves.* jun. 332 and 492; *Howse v. Chapman*, 4 *Ves.* 542. So likewise as to turnpike tolls, *Knapp v. Williams*, in a note to *Corbyn v. French*, 4 *Ves.* 430; and *Howse v. Chapman*, *ubi supra*.

So as to money secured by assignment of poor-rates and county-rates. *Finch v. Squire*, 10 *Ves.* 41.

Maundy v. Maundy, cited p. 46, is in 2 *Stra.* 1020.

The Statute referred to at bottom of p. 47, is 11 and 12 *W. III. c.* 4. See also per *M. R.* 2 *Ves.* jun. 283.

It seems the principal case of *Attorney General v. Meyrick*, was the first decision on the subject, agreeably to what *Sir J. Strange, M. R.* observes at the end of the case, p. 47. Vide 2 *Ves.* jun. 279, 280.

BAILIS *versus* GALE, November 6, 1750.

(Reg. Lib. 1750. A. fol. 149.)

[268]
VOL. II.
Page 48.

NOTES AND OBSERVATIONS.

(1) As to the word "*estate*" in a will, *naturally* meaning the interest, rather than the mere subject matter, vide *Goodwyn v. Goodwyn*, 1 Ves. 226, 228, and the notes on it, *antea* (117).

(2) Besides the bequests noticed in the Report, it seems material to observe, that it appears from Reg. Lib. the testator gave also to Charles, "*those houses he bought of F. W. containing three dwellings, with all their appurtenances.*" And also after the devise of the above-mentioned reversion, "*that tenement in the possession of M. B. presently after his decease.*" Though it is very probable that he *might mean* to give the whole of his interest in each of these particulars, the Court nevertheless was under the necessity of confining the devisee to a limited interest; and therefore declared, that "*as to these estates [alone], Charles was entitled only for his life.*" The observation seems rather important, since it is impossible for any distinction to be more strongly marked, than what appears in this case, taken altogether, and arising as it does, upon the very same instrument.

As to such a devise passing the whole interest, as if the testator had used the expression "*all his real estate,*" see *Nichols v. Batcher*, 18 Ves. 193. 195.

Devise of all that "*estate*" testator bought of M. held to pass the fee. (1) So held also as to another clause which was a devise of "*the reversion*" of that tenement his sister lived in after her death. Held contra as to other devises (2) being, first, "*all those houses he bought of T. W. containing three dwellings, with all their appurtenances,*" and next as to a devise of that tenement in the possession of M. B. presently after his death."

Devise by testor of "*all his real property,*" tantamount to a devise of all his real estate.

[269]

VOL. II.

Page 52.

S. C. 1 Cox,
Ch. Ca. 9.MOGG *versus* HODGES, November 16, 1750.

(Reg. Lib. 1750. B. fol. 611.)

NOTES AND OBSERVATIONS.

Assets not marshalled in support of a devise contrary to law (1) as a gift to a charity.

Money directed to be laid out in lands for such an illegal purpose, shall not be laid out for the heir, but the trust is void altogether.

As to the testatrix's real estate which was devised to be sold, partly for such purposes, the heir was declared entitled to the surplus proceeds.

Money due by testatrix at her death in respect of suits instituted by her relative to her real estates, held to be a charge upon her real estate; and that the personal es-

[270]
tate was wholly exempt. (2)

(1) *VIDE* in *Arnold v. Chapman*, 1 *Ves.* 110, *et antea* (72).

Dalton v. James, cited p. 53, is in *Ambler* 20; *et vide ibid.* 158.

(2) The testatrix had instituted some suits relative to her *real* estate. The Master was directed to take an account of what was due from her at her death, to any attorney, solicitor, or agent employed by her in these suits; and also of all such sums of money as has been paid or laid out by the Defendant, her trustees, or which they were liable to pay on account of such suits: and it was declared, that what should be so found due, *was not* to be considered as a debt on the testatrix's *personal* estate, *but as a charge upon her real estate*, and to be paid thereout, &c. The heir was declared entitled to the surplus of the proceeds from a sale of the real estate, after these and other charges. *Reg. Lib.*

It should be observed, that the words of the Decree are "*in the Suits in the Court of Chancery mentioned in her will.*" No ground, however, as to *the suits being mentioned in the will*, is to be collected *from the pleadings*. One of the answers states the fact of the suits being instituted by her, but without any reference to *the will* in this respect. *Query*, whether there may not

not be an omission in *Reg. Lib.* of the words “*relative to the estates*, mentioned in her will,” &c.

It appears from the note 1 *Cox. Ch. Ca.* 10, that the Decree in *R. L.* is very inaccurately entered in other respects also.

*Mogg
versus
HODGES,*
Nov. 16, 1750.

LEFEBURE *versus* WORDEN, Nov. 16, 1750.

VOL. II.

(*Reg. Lib.* 1750. B. fol. 104.)

Page 54.

NOTES AND OBSERVATIONS.

(1) SEE in *Glynn v. B. of England*, 2 *Ves.* 43, *et antea* (267).

Sir *Biby Lake's* case, mentioned p. 55, is also cited 2 *Ves.* 43.

A person's own entry in books of account allowed on enquiries before the Master as

evidence of a claim made in his life-time; but not as original or positive evidence of the fact. (1)

Entry by servant or agent usually employed in such matters allowed as good evidence upon the proof of his death.

SEDGWICK *versus* HARGRAVE,

Page 57.

November 22, 1750.

(*Reg. Lib.* 1750. B. fol. 133.)

Rolls.

Sir J. Strange,
M. R.

NOTES AND OBSERVATIONS.

(1) THE Master of the Rolls, in this case, seems to have been led, by his indignation at the unconvincible defence set up on the part of the husband and wife, into observations, which the Author humbly submits would be untenable in point of law, as general propositions.

Conditional Decree.
A wife having an equitable interest in 'customary estate of small value, her husband, on a family arrangement

His

SEBOWICK
VERSUS
HARGRAVE,
Nov. 22, 1750.

[*271] ment, receives a comparatively large sum for the relinquishment of their rights. An intermediate suit having been instituted, the husband and wife in a joint answer (1) disclaimed all interest; and in that suit there were no further proceedings. The present bill being filed a long time afterwards, the husband and wife again put in a joint answer, claiming the estate in the wife's right. The Court could not make any personal Decree on the wife; and could only direct the husband to account for the 200*l.* he had received with costs, in case he did not join, and procure his wife to join, (2) in the proper assurances. This

[272]

200*l.*

*His Honour is reported (p. 59) to lay great stress on the wife having put in a joint answer with her husband in the first suit, not complaining of the transaction, and wishing the 200*l.* to be retained in lieu of the estate: and again, His Honour relies on the great length of the adverse possession.

The Author of these notes ought to be diffident, in canvassing the opinion of so great a Judge as Sir *J. Strange*; but he must, as a lawyer, submit, that the long coverture was a sufficient answer to the argument on the length of the adverse possession; and also, that a joint answer of a husband and wife, in common cases, is nothing more, in the view of the Court, than the mere answer of the husband.

The observation that "she might have applied to have answered it separately," does not seem conclusive; since it could only have made the objection formally, which the law would maintain for a *feme covert*, whether put on the record or not.

Since writing the above, the author of this work has been favoured by Mr. *Edward Nares* with a sight of Sir *John Strange's* own notes of the principal case. The arguments were at great length, and, with the judgment, seem to have taken up two days at the Rolls. Amongst other arguments on the part of the wife, are some to the effect above submitted, in the following terms: "What her husband did in 1710 will not bind her; and till his death, she must be kept out by his agreement. Admissions in a wife's answer are considered as under the influence of the husband."

The opposite Counsel had (*inter alia*) urged, that

that the agreement was advantageous to each of the Defendants, which, they contended, was verified by the father's bill in 1715, to set it aside. The observation that "*she might have had leave to put in a separate answer,*" seems to have come from Mr. *Wilbraham*, of the same side, who pressed the husband's unconscionable defence, in screening himself under her; and insisted they should be put to their election, either to join in the conveyance, or to repay the 200*l.* and interest.

It appears from Sir *J. Strange's* notes, that by the joint answer put in by the husband and wife to the former suit in 1717, they said, "*they were and are willing, upon the consideration of 200*l.* already paid them, to release their right and title, or to join with G. S. in a conveyance; or to do any other act for the benefit of G. S. as the Court shall think necessary; they being indemnified by the Decree of the Court, and so that they might not be obliged to refund any part of the 200*l.* which they hoped the Court would not oblige them to do.*" It also appears from the same source, that in the present suit, the wife "*insisted on her title, and that she never agreed to accept the 200*l.* as an equivalent for her right, but as a portion to be given her by her father.*" She further contended "*she was not obliged to refund the 200*l.* or to join in a conveyance; but her husband said he was willing to execute any deed in his power to fulfil the agreement.*"

His Honour's entry of his Judgement is as follows: "I was of opinion, that I could not make a personal Decree upon the wife; but decreed *Dr. R.* to go on with the purchase, and the
" Master

*SEDGWICK
versus
HARGRAVE,*
Nov. 22, 1750.

200*l.* having been paid by the wife's father by way of exonerating his real estate from a supposed in-tail, was held to belong to his grantee of that estate, and not to his personal representative.

(3)

SEDGWICK
versus
HARGRAVE,
Nov. 22, 1750.

“ Master to settle the manner of conveying to
“ him. That *J. H.* should join, and procure his
“ wife to join, within a time to be appointed by
“ the Master; and if they did not, then *J. H.* to
“ refund the 200*l.* to Plaintiff, and pay costs.
“ But if he and wife joined, and he delivered up
“ the bond in 1714 to be cancelled, then to pay
“ no costs.

“ *Dr. R.* to deduct his costs out of the purchase
“ money, and have the title deeds delivered to
“ him.”

“ I grounded my Decree for him to procure
“ her to join, *on her answer in 1717; which she*
“ *did not, by her answer to this bill, say was by*
“ *coercion; and upon its appearing so plainly to be*
“ *for her benefit, and insisted on by her to stand.”*

It appears from *Reg. Lib.* that the bill filed by the father (noticed in the Report, p. 57) stated, that he, being of a melancholy disposition, had been drawn in to execute the several conveyances without consideration; and that the conveyance of 1689 of his customary estate, by way of feoffment, was void, being voluntary, and made after marriage, and without articles previous thereto; and in regard that such estate could not, by the custom of the manor, pass by such conveyance, but by deed and admittance, or licence and payment of a fine; and that such had never been. In this suit, *Hargrave* and his wife admitted the latter facts, and said they were advised, that if the indenture had been good, *G. S.* was tenant in tail; and that they therefore were willing, upon consideration of the 200*l.* already paid them, to release their right, &c. or to do any act for *G. S.*'s benefit, so as not to refund the 200*l.* &c.

In

In the principal suit, the same Defendants said, that by the deed of 1689, G. S. was *only tenant for life*, without impeachment of waste, *and not tenant in tail*; and therefore had no power to bind the intail.

SEDGWICK
versus
HARGRAVE,
Nov. 22, 1750.

It appears from the bill, that the Plaintiff was let into possession by agreement, and the estates conveyed to him by his father, by deed and admittance in 1730, in consideration of an annuity of 15*l.* to be paid to the latter for life. The bill stated, that by the custom of the Manor, estate tails were docked by deed and admittance, and not by recovery, or act equivalent thereto.

The Decree was, "that the Defendant *Hargrave* should join in the proper assurance, and procure his wife so to do. If the Defendant *H.* did join in such conveyances, and did likewise procure his wife to join, &c. His Honour did not think fit to give costs on either side, as between the Plaintiff and them; but if not, then the Defendant *H.* was to refund the 200*l.* received by him on the foot of the agreement in 1710, and pay the Plaintiff his costs of the suit." *Reg. Lib.*

(2) It should be particularly observed, that Lord Eldon, C. in the case of *Emery v. Wase*, on Appeal, 8 *Ves.* 505, very much disapproved of the Court's subjecting *femes coverts* to the disagreeable alternative, resulting of necessity from Decrees that their husbands should procure them to join in furtherance of their own agreements; although the Courts had done so at various times, and in various instances. See that case, and more especially pp. 514, 515, &c.

[275]

(3) See the Report of the principal case, p. 60.

U

It

SEDGWICK
versus
HARGRAVE,
Nov. 22, 1750.

It seems that the Plaintiff, besides being the heir at law, *was also customary heir of the father as to the estates in question, which came ex parte paterna* [and an argument is built upon this in Sir J. Strange's note book].

This circumstance does not appear distinctly noticed in the Report; but it may be remarked, and the more especially, since it *may* account for what the Master of the Rolls says, towards the bottom of p. 59 of the Report, that the purchaser "*might be safe in taking a conveyance from the Plaintiff, there being no legal estate standing out.*" The other reason "*of the long possession,*" there appearing, must, it should seem, evidently be discarded, for the reasons above submitted.

The Author of these notes, upon the whole, and after repeated consideration of the whole case, by no means objects to the Decree, under the peculiar circumstances. The only objection he makes is as to the positions reported p. 59, *taken in general; or relative to a wife being positively bound by an answer put in jointly with her husband.*

In the case before His Honour, much might be said *as to that particular Defendant being bound;* because, having put in two joint answers, the one contradictory to the other, *which of them could be considered as her defence,* since she must be considered as before the Court? The argument, therefore, that if she had objected on the former occasion, she might have answered separately, was a very natural one, though not conclusive. On that account, this seems the proper place for another observation appearing from Sir J. Strange's notes to have been made by the Plaintiff's leading Counsel.

Counsel. It is as follows: "the husband cannot say the wife is not in his power, for they join in an answer; *and if not, he must have shewn she was not in his power*; else process of contempt would have gone against *her*, for want of *her answer*."

SEDGWICK
versus
HARGRAVE,
Nov. 22, 1750.

PARSONS versus DUNNE, Nov. 23, 1750.
(Reg. Lib. 1750. B. fol. 89, entered "Parsons v. Parsons.")

VOL. II.
Page 60.

NOTES AND OBSERVATIONS.

THE matter before the Court, on the petition mentioned in the report, was a question of election; namely, whether Mrs. Dunne would take her share of her father's personal estate according to his will, or according to the custom of London? and further, whether she consented to be bound by the account and agreements contained in the deed, memorandum, and order, stated in the petition? *R. L.*

The signature and certificate of the commissioners "was to be properly attested before some Notary Public at Paris, or verified by affidavit." *R. L.*

Election to be made by a Fem Covert resident abroad, cannot be effectuated under a Power of Attorney, &c. from the husband and wife, or any thing short of a commission, or as near thereto as possible. to

D. of

[277]
VOL. II.
Page 61.

D. of MARLBOROUGH *versus* L. GODOLPHIN,
November 26, 1750.

(Reg. Lib. 1750. A. fol. 97.)

NOTES AND OBSERVATIONS.

Lapsed legacy.
Power.
Devise of
30,000*l.*, to tes-
tator's wife for
life, and after-
ward to be dis-
tributed among
his children, as
she by deed,
will, or instru-
ment in nature
of a will, should
appoint. (1)
She, having
married again,
appoints by will
(*inter alia*) unto
two of the chil-
dren who died
in her lifetime.
Held that their
representatives
were not en-
titled; and that
the shares so
appointed to
them lapsed,
and fell into the
residue.

THE codicil is stated verbatim, 5 *Ves. jun.* 506; but it does not differ from the abstract of it in the report.

(1) This case is certainly very difficult to be reconciled with *Harding v. Glynn* (mentioned page 67, and reported shortly 1 *Atk.* 469, but stated from *Reg. Lib.* 5 *Ves. jun.* 501.), or with *Brown v. Higgs*, 4 *Ves.* 708, 5 *Ves.* 495, and 8 *Ves.* 561. See *per* Lord *Eldon*, C. 8 *Ves.* 576. The distinctions taken in such cases between *powers* and *trusts* have been called very nice; but it seems that the two cases above mentioned, proceeded upon the ground of a *gift* and a *trust*, which involved a *duty to execute it*; while in this principal case there was no gift, and the wife *had a mere power*. See *Butcher v. Butcher*, 9 *Ves.* 382, and 1 *Ves.* and *Beam.* 79.

It should be observed, that although Lord *Eldon* did not reverse the Decree in *Brown v. Higgs*, he said he never should cease to entertain doubts upon the will in that case.

As to various cases on the several points, see them collected in Mr. *Sanders's* note to *Harding v. Glynn*, 1 *Atk.* 469.

In page 62, instead of the words "*after-mentioned*" having reference to the children of Lord *Sunderland*, as stated in the report, they should have been inserted as referable to the *proportions*, namely, "in the *proportions* after mentioned."

Ross

**Ross v. Ewer*, cited p. 93, is in 3 *Atk.* 156.

Rich v. Beaumont, stated p. 64, as in *Dom. Proc.* February 11, 1726, was not decided then, but on February 9, 1727, vide 6 *Bro. P. C.* 152, octavo edition, and the folio edit. Vol. 3, p. 308.

D. of
MARLBOROUGH
versus
L. GODOLPHIN.
Nov. 26, 1750.
[*278]

Madison v. Andrew, mentioned page 65, is in 1 *Ves.* 57, et antea 45.

Oke v. Heath, *ibid.* is in Vol. 1, 135, et ant. 82.

As to *Harding v. Glynn*, as mentioned p. 67, see it stated from *Reg. Lib.* 5 *Ves.* jun. 501. Et vide Mr. Joddrell's note of it, 8 *Ves.* 571. The operation of the devise in *Harding v. Glynn*, as a trust (as observed in the argument of the principal case, p. 67) was the express point; the power having been coupled with a duty to execute it. This distinction alone (as it seems) can support its authority, and that of *Brown v. Higgs*, *ubi supra*, against that of the principal case, see 8 *Ves.* 570. 571. 573. 576. *Jones v. Westcomb*, cited pages 67, 68, is in *Prec. Ch.* 316, and 1 *Eq. Ca. Ab.* 255. It is also cited in *Avelyn v. Ward*, 1 *Ves.* 421.

Fonnereau v. Fonnereau, cited page 68, is in 3 *Atk.* 315.

Madison v. Andrews, cited *ibid.* is in 1 *Ves.* 57.

Bainton v. Ward, cited p. 69, is incorrectly reported, 2 *Atk.* 172; more correctly stated, 2 *Ves.* 2, and from *Reg. Lib.* 7 *Ves.* 503, note.

Oke v. Heath, mentioned p. 72, is reported 1 *Ves.* 135, et antea 82.

Burnet v. Holgrave, *ibid.* cited and reported *Eq. Ab.* 296. cannot be of authority. Vide per Lord Hardwicke, C. 1 *Ves.* 140. It is reported imperfectly in *Eq. Ab.* See 2 *Ves.* 80.

(2) See

D. of
MARLBOROUGH
versus
L. GODOLPHIN.
Nov. 26, 1750.
[*279]

Construction.
Courts of Law
and of Equity
will equally
transpose words
in instruments
to make the
limitations
intelligible, and
attain the
party's clear in-

tent; but never to defeat the interests given, or let in more than expressed. (2)
Will by Feme Covert good, and proveable in the Ecclesiastical Court, if made
with assent of her husband. (3)

Appointee under a power, must claim not only under the power, but according
to the nature of the instrument under which it is executed. If an instrument is
to operate as a will for the execution of a power, it must have all the incident
consequences of a will. In the case of a will to pass lands by virtue of a power,
it must be executed according to the provisions of the statute of Frauds. And so
in the case of a testament to pass personalty under a power; it must be such an
instrument as is capable in its own nature of passing personal estate. (4)

So in the case of copyholds surrendered to the use of a will, and certain uses
appointed by will, if the appointee die in the testator's lifetime, his represen-
tative cannot take any benefit; although the rule is generally, that copyhold
lands pass by the surrender. The reason is, that the act is not complete in
such case, from the non-operation of the will in the testator's lifetime. When
the execution of a power is by will, and is not expressed in the precise words
which would be required in a deed, as under a clear intent to create an estate
tail, though not formally worded, there the Court will effectuate such intent,
notwithstanding the appointee takes, in some sense, under the power.

And so in like cases (5) where, in any power, there is also one of revo-
cation, and to appoint new uses, and the power itself is executed without
any like reservation of a new power to revoke, the act (if substantive from the
nature of the instrument) is irrevocable. (6)

Appointee under a power, takes under the authority of that power, as if therein
mentioned *nominatim*, in so far as relates to the substance of the benefit; but he
does not take as from the time when the power was created. (7)

Mere powers construed strictly: Powers coupled with an interest construed
liberally. (8)

Tenants in common may be of unequal shares, but not of uncertain shares. (9)

An executor or residuary legatee stands in the same light, as to personalty, as
an heir does to the realty; so as to take all that falls in beyond the intent of the
testator; as by operation of law. (10)

*(2) See page 74 of the report.

(3) See page 75.

(4) See pages 76 and 77.

(5) See page 77.

(6) See page 77.

Hele v. Bond, cited *ibid*, is also mentioned in
the same Vol. 211.

(7) See page 78.

(8) See page 79, et vide *Zouch v. Woolston*, 2
Burr. 1136.

(9) See page 81.

(10) See page 83, et vide *Durour v. Motteux*.

*1 *Ves.* 320, *et antea*, (157). *Brown v. Higgs*, 4 *Ves.* 708, &c. 2 *Roper on Legacies*, 487, &c. &c. &c.

As to the observations in the report, p. 83, upon the words "give" or "devise," &c. see Mr. Sanders's note to *Hurding v. Glynn*, 1 *Atk.* 469; 1 *Ves. jun.* 270, and 2 *Ves. jun.* 33, *et* 529.

D. of
MARLBOROUGH
versus
L. GODOLPHIN,
Nov. 26, 1750.
[*280]

HENSELY versus CHALONER, Dec. 4, 1750.

VOL. II.

(*Rg. Lib.* 1750. *A. fol.* 114.)

Page 83.

NOTES AND OBSERVATIONS.

Graves v. Boyle, cited p. 84, of the report, is in 1 *Atk.* 509.

Madison v. Andrew, cited *ibid.*, is in 1 *Ves.* 57, *quod vide*, *et antea* 45.

Coleman v. Seymour, cited *ibid.* is in 1 *Ves.* 200, *et antea* 113.

See page 84.—The Plaintiff applied for payment of her share of the 200*l.* and interest, upon her coming of age in 1746, and the Defendant *Chaloner*, the executor, then claiming also to be a mortgagee upon part of the testator's estate, a bill was filed for an account, and to have the residue applied in discharge of his mortgage debt, &c. That suit was afterwards referred to arbitration, and an account taken by the referees; upon which, as the present bill alleged, "it appeared that there was an overplus of 50*l.* in the Defendant's hands above what was sufficient to answer the legacy of 200*l.*, which last mentioned sum was retained in his hands to answer such legacy,

Bequest to younger children of testator's son, to be paid at 21; held vested in those born at the time of testator's death.

Though the Court is not strict in holding executors, who have acted fairly, to an admission of assets; yet in this case, circumstances tending to shew that the Defendant had admitted assets several years before, and he having obtained a release, which the Court held to be fraudulent,

[281]

"

HORSELY
versus
CHALONER,
Dec. 4, 1750.

a personal Decree was made against him for the legacy and interest, with costs.

"legacy, when payable." The present bill also stated, that the Defendant admitted, that he then made and signed an indorsement on the mortgage, purporting to be an acknowledgment that he the Defendant had received 50*l.* towards the mortgage.

The Plaintiff stated by supplemental bill that the original cause being at issue, and witnesses examined, and a reference to arbitration having taken place, the Defendant afterwards took advantage of the Plaintiff having no person present to advise with her, and procured her, *under a false suggestion*, to sign what he called a note, but which she afterwards found was a release. The Defendant *stated* the release to have been fairly executed, and that the Plaintiff was to have had 25*l.* (being half of the balance of 50*l.* in his hands) in consideration of it, but that she afterwards refused to take it. He insisted that this was all that was due to her; and urged, if the indorsement tended to admit that he had retained the 200*l.* in his hands to answer the legacy, the referees and parties concerned, had imposed upon him. He stated, that "he waived the benefit of" the general release, since the Plaintiff refused to "accept of the 25*l.*, the consideration thereof, and "was willing to deliver it up to be cancelled." *Reg. Lib.*

The Court decreed the release to be set aside for *fraud*, and delivered up to be cancelled; and it directed the Defendant to pay the costs of the suit. *Reg. Lib.*

EYRE *versus* EYRE, Dec. 4, 1750.

(Reg. Lib. 1750. A. fol. 643.)

[282]
VOL. II.
Page 86.

NOTES AND OBSERVATIONS.

It appears from *R. L.* that the proceeds of the bullion *were remitted to, and received by, the father, Christopher himself*, notwithstanding what appears at the conclusion of the case. The *parties were not left to proceed at law*. The bill was dismissed only as to *Lock*, and the *East India Company*.

As to the rest, it was declared, "it appeared that the total amount of the effects which were considered by the executors and trustees of the will of *R. E. the younger*, as the assets of the said *Robert Eyre*, was the sum of 2828*l.* 19*s.* 1*d.* and that *Christopher. E.* had thereout paid and retained, on account of the bond creditors of *Robert*, the sum of 2281*l.* 15*s.* 5*d.* so that there remained the sum of 543*l.* 3*s.* 8*d.* which was considerably less than appeared by the account annexed to the answer to be the produce of the chest of bullion, which had been purchased with the monies advanced by *Christopher*, and by the Plaintiffs; which *appearing to have come to the hands of Christopher, ought to be answered and paid out of his personal estate, and out of his real estate charged with his debts by his will*. Wherefore, by consent of the Plaintiffs and the Defendants, the executors and devisees of *Christopher*, it was decreed, that such sum of 543*l.*

Plaintiffs intending to lend money to their brother in the East Indies, pay it to his agent in England, who remits in bullion. The brother was dead when the advance was made; his executors send the value of the bullion back to England, where it is received by the father. The agent's authority being revoked by the death of his principal, held it was no loan to the brother. The Court declared that the proceeds so received by the father ought to be answered out of his estate: but the parties compromised the matter at a less sum.

[283]

EYRE
versus
EYRE,
Dec. 4, 1760. " 543*l.* 3*s.* 8*d.* should be divided proportionably
" between the Plaintiffs in respect of their demand,
" and the Defendant, the representative of *Chris-*
" *topher*, in respect of his demand of the sum ad-
" vanced by him to Mr. *Lock*, at the same time,
" and on the same account." *Reg. Lib.*

VOL. II. GOWER versus MAINWARING, Dec. 5, 1750.

Page 87.

(No Entry.)

Vide S. C. after
wards 2*Ves.* 110.

NOTES AND OBSERVATIONS.

Trust deed, (1) *Vide Goodinge v. Goodinge*, 1 *Ves.* 231.
whereby trus- 232, *et antea* (122), and in *Pyot v. Pyot*, 1 *Ves.*
tees were to 335. 337, *et antea* 161.
give the residue
of A.'s estate

The case cited, page 88, of *Sir Coniers Darcy*
" among his v. *Lord Holderness*, is also cited 1 *P. W.* 704,
" friends note.
" and relations
" where they

" should see most necessity, and as they should think most just." (1)

Though in other cases the Court will not interpose where trustees, declining to
act, have a power to distribute generally according to their discretion, without
any defined object, it was held that here a rule was laid down; the word "*friends*"
meaning "*relations*:" and that the Court could judge of the respective families'
necessities and occasions by a reference to the Master.

ASKEW *versus* The POULTERRERS' COMPANY,
December 6, 1750, [and June 6, 1751.*]

(*Reg. Lib. 1750. A. fol. 425.)

[284]
VOL. II.
Page 89.

NOTES AND OBSERVATIONS.

(1) SEE also 1 *Ves.* 233. This was the sound doctrine; but the Courts of Law since Lord *Hardwicke's* time seem to have "amplified their Jurisdiction" on the point in question to a degree almost of legislation. It certainly, for instance, was the law in the greater part of Lord *Hardwicke's* time; and it was that great Judge's express opinion, that no action could be brought upon a bond, without a *proferat in curia*; so that in case of a lost bond, the remedy was alone in Equity. See in *Walmsley v. Child*, 1 *Ves.* 345, and *Whitfield v. Fawcett*, *ibid.* 392, 393, *et antea* 163 and 169; and in *Ward v. Turner*, 2 *Ves.* 442. The Courts of Law have, however, since taken cognizance of such matters; see *Read v. Brookman*, 3 *T. R.* 151, and many subsequent cases. The wisdom of "keeping the ancient paths," and the inadequacy of the remedies of such a new tried, and self-created Jurisdiction, is fully shewn by the judicious observations of Lord *Eldon*, C. in *ex parte Greenway*, 6 *Ves.* 812, 813; in 7 *Ves.* 20, &c.; and in 9 *Ves.* 466, &c. As to which also, vide note on *Walmsley v. Child*, 1 *Ves.* 345, *antea* (163): and 15 *Ves.* 338.

On loss of a deed, &c. the same rule of evidence here, as at Law. (1) Loss of deed can only be made out by circumstances. The destruction of a deed, &c. by affidavit. Decree in a former cause between the same parties, read as evidence, though not conclusive. So also of depositions in a cause which had settled the rights of all; as under a Decree for performance of trusts.

* There is no entry in R. L. referable to the period mentioned in the report. On the 6th of June following, however, the bill was dismissed without costs, by consent. Reg. Lib. ubi *supra*.

BISHOP

[285]
VOL. II.
Page 91.

BISHOP of CLOYNE *versus* YOUNG.
December 7, 1750.

(Reg. Lib. 1750. A. fol. 151, entered "*Berkely v. Young.*")

Testator, manifesting an intention to dispose of the residus, but leaving it inchoate inasmuch as he did not name the residuary legatee; it was held that the executors were not entitled to the surplus. (1) Where parol evidence can be read to show no resulting trust, like evidence may be read contra, to disprove the implication from the former. (2) Legacy to one alone of two (or more) executors will not exclude either. (3) Legacy to the daughter, &c. of an executor is not to be deemed a legacy to him, so as to prevent his taking the surplus, merely for that reason. (4)

NOTES AND OBSERVATIONS.

(1) VIDE also *Lord North* and *Guilford v. Purdon*, 2 *Ves.* 495, post 394. *Blinkhorn v. Feast*, 2 *Ves.* 27, et antea (262); Likewise *Andrew v. Clark*, 2 *Ves.* 162; and *Wilson v. Ivat*, 2 *Ves.* 166, et postea (317). See also *Griffiths v. Hamilton*, 12 *Ves.* 298 to 310; and *Langham v. Sanford*, 17 *Ves.* 435, &c. affirmed on appeal by Lord Eldon, C. Mic. T. Nov. 14, 1816. 2 *Meriv.* 6.

(2) Vide 12 *Ves.* 298 to 310; and *Langham v. Sanford*, 17 *Ves.* 435, as well as per Lord Eldon, C. on the appeal, Nov. 14, 1816; when that case shall be reported.

(3) Vide also in *Blinkhorn v. Feast*, 2 *Ves.* 27, et antea (262); and *Wilson v. Ivat*, 2 *Ves.* 166, et postea 317.

(4) And it was held by Sir J. Strange, M. R. that an executor was not excluded by a real estate given to his wife; see *Wilson v. Ivat*, 2 *Ves.* 166.

In the principal case, immediately after the "&c." mentioned in the report, at the end of the first paragraph, the testator wrote "Dated at Evely, this 19th day of Nov. 1746." R. L. This seems not quite immaterial. The Author thinks that an argument might have been raised in favour of the executors, if the instrument had ended merely with the "&c." since it might have been said

*said it was an omission *merely occasioned by an interruption*, or the like; but which the testator would (if at all requisite) have remedied by inserting the names of his executors again. *As, however*, there *were* consecutive words, all such inference is negatived, and the “&c.” resembled to the precise case of an *intermediate blank*, as in that of *Lord North and Guilford v. Purdon*, 2 *Ves.* 495. *post* 394. See *White v. Williams*, 3 *Ves. & Beam.* 72.

Bp. of CLOYNE
versus
YOUNG,
Dec. 7, 1760.
[*286]

The Defendants (*inter alia*) insisted, that the Defendant *Browne* had no legacy given him; and hoped, that the legacy given to his children neither was, or ought to be considered as a beneficial legacy to him, in any respect to deprive him of the right he had as executor, &c.; and that his younger daughter, and his niece, were *near 21*, at the testator's death. That, notwithstanding the bequest to *Young*, they were entitled, &c. *That there was no blank vacant space left in the will*, wherein the name of any residuary legatee could, or seemed designed to have been, inserted; and that they did not believe the testator ever designed to appoint the Plaintiffs his residuary legatees. That they, the Defendants, had been acquainted, and in the greatest intimacy and friendship with the testator for many years, and that the Defendant *Young* had often paid money for, and lent money to him, without charging interest for it. They stated also various circumstances in which the testator had received great benefits from them, and particularly from *Brome* and his father, and that he was sensible of this. They stated, moreover, that the testator in a former will had made *Brome* his executor, and given him

Bp. of CLOYNE
versus
 YOUNG,
 Dec. 7, 1750.
 [*287]

*him a legacy, and made his daughter and niece residuary legatees of his whole personal estate; whereas *Brome* had not so much as a ring left him by the testator's last will, nor would he receive any return for the great and many services he had done him, unless he was entitled to a share of the residue. *R. L.*

Foster v. Mount, cited page 92, is in 1 *Vern.* 473. Though it has often been said to have been the first case on the subject, there are traces of some earlier. See as to this, and various distinctions arising on most of the cases in Mr. *Raithby's* elaborate note on 1 *Vern.* 473, &c. *Page v. Page*, cited p. 93, is in 2 *P. W.* 488; as to which see also 1 *Ves.* jun. 66, 67, and the note. *Painter v. Salisbury*, cited *ibid.* is again mentioned p. 99, and is the case referred to by the M. R. towards the top of page 167; see also 1 *Ves.* jun. 66. *Wheeler v. Sheers*, cited also p. 93, is in *Mose*, 290. The Duchess of *Beaufort's* case, cited p. 94, is in 2 *Vern.* 648. *Griffith v. Rogers*, cited *ibid.* is in *Prec. Ch.* 231. *Blinkhorn v. Feast*, cited *ibid.* in 2 *Ves.* 27, *et antea*, (262), *quod vide.* *Littlebury v. Buckley*, cited p. 95, is in 1 *Eq. Ab.* 245. *pl.* 9.

VOL. II.

Page 100.

S.C. 1 Dick. 148.
 1 *Ves.* 542, 543.
et antea (241).
Quod vide.

OATES *versus* CHAPMAN, Dec. 8, 1750.

Costs refunded, upon the reversal of an Order which had allowed a demurrer.

BISHOP

BISHOP versus CHURCH, Dec. 12, 1750.

(Reg. Lib. 1750. A. fol. 106.)

[288]
VOL. II.
Page 100.

NOTES AND OBSERVATIONS.

(1) VIDE 2 Ves. 371, et *Thomas v. Fraser*, 3 Ves. 399. *Burn v. Burn*, ibid. 573. *Gray v. Chiswell*, 9 Ves. 118. 124, 125, et per Lord Eldon, C. 10 Vesey 227. and *Summer v. Powell*, 2 Merivale 30.

As to the argument, p. 101, upon a lost bond, see *Walsley v. Child*, 1 Ves. 345, et *antea*, (163), and *Whitfield v. Faucet*, 1 Ves. 392, 3, et *antea* 169. So likewise *antea* 284.

Simpson v. Vaughan, cited p. 101, is in 2 Atk. 31. *Blundell v. Barker*, cited ibid. is in 1 P. W. 634.

Probert v. Clifford, cited p. 102, is in 1 Atk. 446, and *Ambler* 6.

Primrose v. Bromley, cited ibid. is in 1 Atk. 89.

S.C. 2 Ves. 371. et postea (368.) quod vide. Depositions of a witness being too general, he was directed to be examined upon interrogatories before a Master. Relief on bond misdrawn by mistake; and a just demand out of assets will be satisfied in Equity, though there be no remedy at Law from the nature of the instrument, &c. (1)

SALKELD versus SCIENCE, Dec. 14, 1750.

(Reg. Lib. 1750. B. fol. 671.)

Page 107.

NOTES AND OBSERVATIONS.

(1) It appears from the record, that the plea was substantially faulty in many more respects than are stated in the report. The Report of the judgement, after noticing that the plea would have been proper in point of form, if the exception had been "other and further than in the release hereinafter

As a plea containing an exception of matters thereafter mentioned is bad, and must be over-ruled; so a plea (coupled with an answer) of a release "further and "other than in "the

SALKELD
versus
SCIENCE,
Dec. 14, 1750.

"the plea set
forth," is in-
correct, though
not sufficient to
over-rule it.
It was there-
fore ordered to
stand for an an-
swer with liber-
ty to except. (1)

hereinafter mentioned," states that it was bad in substance, for reasons which appear rather obscurely expressed. No sufficient entry of the case appears in *Reg. Lib.* but the editor having been favoured by his friend Mr. *Bligh*, with a statement of it from the original Record of the Pleadings, is gratified in subjoining it.

21st May, 1750. Bill of Revivor, &c. stated the original bill, which was for an account of testator's estate and effects. That the original Defendant was dead, and Defendant *E. Science*, his executrix, who had possessed evidences, &c. relating thereto, &c.; stating pretences on the part of the Defendants, the executrix, &c., that the estate had been administered under the direction of the Plaintiff *Sarah*, when the wife of one *P. Ruffe*, and the surplus placed out on securities. Charge that a release was executed by her and *Ruffe*, and a deed by her when the widow of *Ruffe*; which deeds were obtained by fraud, and that it related only to the sums specified in it; and that the executors had received other parts of the estate, both before and since, for which they ought to account. And it proceeded also to charge that one of the Defendants, after the death of testator, fraudulently got possession of the key of his private repository, from whence the Defendants took various securities, which they ought to account for, &c.

The plea and answer of *Elizabeth Science*, put in 6th August, 1750, was in bar to so much of the said bills as sought "any account or discovery" (*further and other than is in this her plea set forth*) "of the personal estate of *J. S.* deceased, &c., which came to the hands, &c. of *T. Science*, or any, &c., on or before the 11th day of April 1744,"
" &c.

&c." The plea then averred (*inter alia*), that on the 1st of April, 1742. *P. Ruffe* and the Plaintiff his then wife, executed a deed poll or release, then in Defendant's custody, ready to be produced, in the words, &c. following : which specify by way of recital, various dealings, &c. with the personal estate under the approbation of the parties to it; after which it was witnessed that *P. Ruffe* and the Plaintiff his wife did thereby release and discharge *W. M. & T. S.* from all suits in respect of the personal estate, &c. The plea then stated that the above deed was duly executed by all parties; and further that the Defendant had in her custody a *Deed Poll dated 4th April, 1744*, executed by Plaintiff when the widow of *P. Ruffe*, and indorsed on the release, which Deed Poll it set forth, and whereby the Plaintiff testifies her approbation of what had been done under the release, and indemnifies the parties in respect of it, &c. The plea then avers that the several matters in the deed recited and thereinbefore set forth, were true, &c. after which the Defendant answers in support of her plea "*to so much of the Bill as was not before pleaded to.*"

SALKELD
versus
SCIENCE,
Dec. 14, 1760.

[(2) A plea of a release ought to set out the consideration on which the release was made, *Hardr.* 163; and the release ought to be under seal; otherwise it must be pleaded as a stated account only. *Gilb. Ch.* 57. Note to the third, or Irish edition of *Ves.*] For various other matters, and the cases on them, see Mr. *Beames's* very valuable treatise upon Pleas in Equity, page 42.

[289]
VOL. II.

Page 108.

WEAVER *versus* EARL OF MEATH,
December 14, 1750.

(Reg. Lib. 1750. B. fol. 544, entered "*Weaver v. Brabazon.*")

NOTES AND OBSERVATIONS.

Plea on the ground of forfeiture must be confined to protect against a discovery of the act causing it, and not extend to matters collateral.

[In all cases of forfeiture, if Plaintiff alone is entitled to it, and waives it, Defendant must discover; and though Plaintiff is not entitled to the forfeiture, yet if Defendant binds himself not to insist on being protected from discovery, the Plaintiff will compel him to make it. *Mosely* 75. Note to the third, or Irish, edition of *Vesey*.]

See further Mr. *Beames's* Elements of Pleas in Equity, 264, 267, 269.

Page 109

GREGOR *versus* MOLESWORTH,
December 14, 1750.

(Reg. Lib. 1750. A. fol. 158.)

NOTES AND OBSERVATIONS.

Length of time proper for a plea, but not for a demurrer (1)

(1) It was, however, decided *Contrà*. See in *Hardy v. Reeves*, 4 *Ves.* 479; and *Sherrington v. Smith*, *Dom. Proc.* 2 *Bro. P. C.* 62, octavo edition; and 1 *Bro. P. C.* 95, folio. See also the judicious observations in Mr. *Beames's* late work on Pleas in Equity, 305, 306, and the last edition of Lord *Redesdale's* work, there referred to, 167, 171, &c. the cases in 1 *Ves. & B.* 817 note (a); *Edwards v. Carroll*, 2 *Bro. P. C.* 98; and *German v. McCulloch*, 5 *Bro. P. C.* 597, octavo edit. *S. P. Foster v. Hodgson*, 19 *Ves.* 180. Et vide per Lord *Redesdale*, C. 2 *Sch. & Lef.* 637, 638, &c.

CHILD

CHILD *versus* BRABSON, Dec. 18, 1750.

(Reg. Lib. 1750. A. fol. 62.)

[290]
VOL. II.
Page 110.

NOTES AND OBSERVATIONS.

(1) BESIDES what is so forcibly observed by Lord *Hardwicke*, p. 111, it was held in *Bailey v. Bailey*, 11 *Ves.* 151, to be quite settled, that a Defendant, until a fourth insufficient answer, is entitled to be discharged from custody, on putting in a further answer [and tendering the costs of contempt], without waiting the Report upon the exceptions, although the costs have not been accepted. Same as to examinations. See *Bonus v. Flack*, 18 *Ves.* 287.

Defendant in custody for want of further answer, putting it in, will be discharged on paying the costs of the contempt. If that answer, or any further one, proves to be insufficient, the Plaintiff may resume the process where it left off. (1)

TAYLOR *versus* LEWIS, Dec. 20, 1750.

NOTES AND OBSERVATIONS.

It was held in *Farewell v. Cooker*, 2 *P. W.* 460, that where a country client employed a solicitor, who employed a clerk in court, and the client in the country paid his solicitor, who suffered the clerk in court to remain unpaid; the client was not bound to pay the latter: but still, that if the clerk in court had any papers in his hands, he might retain them. See also on other points, the anonymous case, 2 *Ves.* 25; *Stevens v. Avery*, 1 *Dick.* 224; *Anon.* 2 *Dick.* 102, with the cases there mentioned; but more particularly Mr.

Page 111.

S. C. 8 Atk. 727.

As to rights and remedies of six clerks, and clerks in court, for their fees. Their lien on papers, &c. Whether six clerk can stop proceedings until paid his fees which had been paid to the clerk in court of his division, who had absconded. (1)

x 2

Beames's

Clerk

TAYLOR
versus
LEWIS,
Dec. 20, 1750.
[291]

Clerk in court
cannot be
changed at the
mere will of a
party. (2)

Beames's valuable work on the Orders in Chancery, p. 224, &c. with the cases in the note 227.

(1) As to the establishment of the clerks in court, and the regulations between them and the six clerks, as now existing, see 3 *Ves.* 589, &c.

(2) Vide *Twort v. Dayrell*, 13 *Ves.* 195, and the cases there cited.

VOL. II.

Page 112.

MARASCO *versus* BOITON, Dec. 19, 1750.

After appearance, no special injunction (such as to stay the navigating of a ship), without notice.

Page 113. BISHOP *versus* WILLIS, Dec. 19, 1750.

Orders made upon petitions are not discharged on motion.

Page 113. ANONYMOUS, December 20, 1750.

No jurisdiction in the Court to deal with any property given over in default of issue upon any probability whatever of there being no issue. (1)
Bills in parliament on such grounds often refused.

(1) See also *Kirby v. Clayton*, *postea* 332, 2 *Ves.* 241.

Page 113. *Ex parte* WYLDMAN, December 20, 1750.

S.C. 1 Atk. 109.

NOTES AND OBSERVATIONS.

Bankrupt—
One of two debtors becomes a bankrupt, and the creditor proves

A creditor having securities of third persons, to a greater amount than the debt, may prove and receive dividends upon the full amount of the securities,

*curities, to the extent of twenty shillings in the pound upon the actual debt. *Ex parte Bloxham*, 6 Ves. 449 and 600.

Ex parte
WYLDMAN,
Dec. 20, 1750.
[*292]

Note, however, a distinction made between that case and *ex parte Leers*, in the same vol. p. 644, in which it was (unwillingly) held, that *dividends*, declared upon a bill of exchange, though not received, must be deducted from the proof by the indorsee, under another commission of bankruptcy.

proves his whole debt under the commission, but no dividend made. That creditor, though he receive a composition from the other debtor, may still receive a dividend upon his whole debt as proved, till he obtain 20s. in the pound.

It should be observed, that Lord Eldon, C. in making this order, said, *the principle* of the practice stated, and upon which he thought the order warranted, *was very doubtful*. See p. 646. And note further, that the holder of a bill of exchange [having received payment] might be compelled to prove under the bankruptcy of the acceptor, for the benefit of the drawer. See per Lord Eldon, C. 6 Ves. 734.

It would have been otherwise if he had received a dividend before the bankruptcy. As to the equity of sureties who have paid the demand of a creditor who has proved, or is entitled so to prove under a commission; and their present remedies by stat. 49 Geo. III. c. 121. § 8.

And a surety, depositing the money and indemnifying against expence, &c. might compel the creditor to go against the principal debtor, and even to prove under a commission of bankrupt for his, the surety's benefit. Ibid.

The Statute 49 Geo. III. c. 121, sect 8, has since vested the proof made by a creditor, who has been paid by a surety in such surety, and vested in the surety a right to prove *per se*, where no proof has been made by such creditor.

The equity of the surety cannot, however, operate in any degree to the prejudice of the original creditor. See *ex parte Rushforth*, 10 Ves. 409; and *Payley v. Field*, 12 Ves. 435.

Ex

Ex parte
WYLDMAN,
Dec. 20, 1750.
[*293]

**Ex parte Bennett*, cited p. 114, is in 2 *Ask.*
527; *Cooper v. Pepys*, cited *ibid.* is in 1 *Ask.*
106.

VOL. II.

Page 116.

DUKE OF BEDFORD *versus* COKE,
January 14, 1750-1.

NOTES AND OBSERVATIONS.

Vide S.C. 1 Dick.
178, as to a
question of in-
terest on arrears
of annuity and
simple contract
debts.

On forfeiture of
an estate, the
crown or its
grantee takes it
cum onere; that
is, subject to all
charges fairly
binding the
party with refer-
ence to it, al-
though volun-
tary; but not
subject to debts
at large.

The crown in
such case has
the same Equity
to be relieved
against convey-
ance on the
ground of fraud,
&c. &c. as the
party would
have.

No interest

[294]

given

(1) VIDE *Bickham v. Cross*, 2 *Ves.* 471, *et*
postea (388).

(2) In the year 1743, interest had been refused
to be given in this very cause, on the arrears of
another annuity, under much harder circumstan-
ces. The Plaintiffs were simple contract creditors.
The Duchess of *Wharton* was entitled to a join-
ture of 1200*l.* *per annum*, and the Master's Report
had stated the arrears of it to amount to 22,000*l.*
The Duchess, being in great distress by this, ap-
plied for a computation of interest, stating
specially, that she had been obliged to borrow
money for her support. The Court was, however,
under the necessity of refusing the application,
notwithstanding the estate had turned out amply
productive from the discovery of mines. Lord
Hardwicke expressed himself to this effect—"The
" question is, whether this liquidated sum is to
" carry interest. This is a hard case, and I would
" come at it if I could. If interest has been re-
" served by the Decree, where there is no legal
" remedy, the Court may give it in their discre-
" tion. One question is, as to the rule of the
" Court, whether she is entitled; secondly, as to
the

" the discretion of the Court. As to the first, she
 " is not entitled by the rule of the Court; for, at
 " law, where there is no penalty, no interest is
 " given: where there is a penalty, you may levy
 " for the whole. If you bring an action of debt,
 " interest may be recovered by that new action.
 " If she is not entitled by the rule of law, how is it
 " in this Court? In this Court, if there is delay
 " of payment upon a Decree, I do not know that
 " the Plaintiff can pray interest. Upon mort-
 " gages, the Master computes it from the confir-
 " mation of the Report; but I do not recollect an
 " instance where the Court has gone the length
 " now prayed." It appears, that as it was a hard
 case, the Lord Chancellor directed a search for
 precedents; but that none being found, he could
 not make the order. See per Lord *Loughborough*,
C. 2 Ves. jun. 166-7. Et vide *S. C.* 1 *Dick.* 178.
See 2 Ves. jun. 163. But see 2 *Dick.* 648.

D. of BEDFORD
~~VERSUS~~
 COKE,
Jan. 14, 1760-1.

given on arrears
 of a voluntary
 annuity.
 Nor without a
 very special
 case, (1) on ar-
 rears of annui-
 ties in general,
 (2) or arrears of
 maintenance,
 simple contract
 debts, &c. (3)

The Master of the Rolls says (1 *Vesey* 170),
 that the question of interest, as to arrears of an-
 nuity, is in some degree discretionary. It is ap-
 prehended this must be taken with reference to
 what is said by Lord *Hardwicke* above in this note.
See Creuse v. Hunter, 2 *Ves. jun.* 157. Vide
 nevertheless, 2 *Dick.* 644.

(3) Many endeavours have been used to obtain
 interest upon the amount of simple-contract debts,
 ascertained by a Master's Report; but it seems the
 Court will never allow it in any case merely of this
 nature. See *Creuse v. Hunter*, 2 *Ves. jun.* 157,
 and Mr. *Vesey's* note 169. And it should be
 observed, that although *Bickham v. Cross*, 1 *Vesey*
 471, 472 (*et postea*, with the note), may, on a
 hasty view, seem contra, Lord *Hardwicke*, never-
 theless,

D. of BEDFORD *versus* COKE, Jan. 14, 1750-1. theless, decided it consistently with the above principles. See per Lord Loughborough, C. 2 *Ves.* jun. 160, 166.

Interest will not be given on arrears of maintenance, 14 *Ves.* 516.

VOL. II.

Page 117.

Rolls.

EXEL *versus* WALLACE,
January 28, 1750-1, and January 22, 1751.

(Reg. Lib. 1750. A. fol. 217.—And Reg. Lib. 1750. A. fol. 492.)

Sir John
Strange, M. R.

NOTES AND OBSERVATIONS.

See this case on appeal from the *second point*, 2 *Ves.* 318, &c. when the Decree was affirmed.

First point.—Bequest of residue of personal estate after a life interest to the use of all and every the children of testator's daughter equally; *to be transferred, delivered, and paid* (1) to them severally, when by law able to receive and give discharges. Held

[296]
to be vested in each child on coming into being,

(1) SEE 1 *Roper on Legacies*, 151, &c. 177, 178, &c.

(2) See page 325. As to this leasehold estate, it is to be *particularly observed*, that it belonged to *Andrew Smith, the maternal grandfather*. Vide Reg. Lib.; et per Lord Hardwicke, 2 *Ves.* 322 and 324.

This is the more specially to be pointed out, with the above references to support it; since it evidences the Report to be wrong in two places; namely, at the bottom of page 120, and towards the top of page 325, where it makes the argument to infer, that the estate in question proceeded from *the husband, and not the wife's father*. The word "*again*," therefore, in the first instance and the word "*back*," in the latter, *should be omitted*.

Seymour v. Bingham, cited p. 120, is *Seamer v. Bingham*, 3 *Atk.* 54; et vide *Bennett v. Seymour*, *Ambler* 521.

Lord

Lord Beauclerk v. Miss Dormer, cited p. 121, is in 2 *Atk.* 308, which Lord *Thurlow*, C. said is well reported. See 1 *Bro.* 190.

EXCEL
versus
WALLACE,
Jan. 28, 1750-1.
and
Jan. 22, 1751.

being, and transmissible; though subject to be varied by the birth of others.

Second point.—Trust of the residue of a term with a double aspect, viz. Settlement on marriage by deed of a leasehold estate (2) in trust for the husband and wife for life; and after the decease of the survivor, to be assigned by the trustees, with the rents and profits, to the eldest son; “and for want of such issue of such son,” to daughters.

A son having been born, who died without issue in the life of the mother, held that it did not vest in him, but was a good remainder to an only daughter at the death of the surviving parent.

The Decree in this point affirmed on appeal, 2 *Ves.* 318. Courts will avoid a construction leading to a perpetuity and void devise, if possible. So they will, in marriage settlements, consider the general intent as in favour of the issue described, and not let property revert, or go to a father as the representative of one child to the prejudice of the rest, if no positive reason for it to be clearly inferred.

DUKE OF BRIDGWATER *versus* EGERTON,
January 29, 1750-1.

VOL. II.
Page 121.

(*Reg. Lib.* 1750. A. fol. 606, entered “D. of B.
v. *Lyttleton*.”)

Vide S.C. accurately reported 1 *Bro.* 280, note.

NOTES AND OBSERVATIONS.

This case being imperfectly stated in Mr. *Vesey's* Report, the profession should be referred to an accurate Report of it in 1 *Bro.* 280, note.

(1) *Levison v. Gower*, cited at the beginning of the Report, is in *Barn. Rep. Ch.* 54; and is mentioned 1 *Ves.* 202. As to points on heir-looms, vide *Trafford v. Trafford*, 3 *Atk.* 347; *Wyth v. Blackman*, 1 *Ves.* 196, 202, *et antea* (110); *Boon v. Cornforth*, 2 *Ves.* 227.

Books not heir-looms (1); and if limited to go with entailed lands, they become the property of the first tenant in tail. (2) Younger son becoming an eldest, entitled to take *eo nomine*

(2)

D. of BAIRD -
WATTS
versus
EGERTON,
Jan. 29, 1750-1.

[297]

mine. (3)
Devise of house
and appurte-
nances to wife
during widow-
hood; but that
the eldest son
when 21, or
married, might
have it, on
notice.—

(2) Vide *Ca. of Lincoln v. D. of Newcastle*,
12 *Ves.* 218.

(3) The eldest son of the marriage had died under
21, unmarried. It was accordingly declared,
“that the said *J. Duke of B.* dying under the age
“of 21, and unmarried; and the *Plaintiff* being
“now the eldest son of, &c. for the time being,
“will, when he shall attain his age of 21 years, or
“be married; and, on giving notice of his desire
“for that purpose, be entitled, &c.” *Reg. Lib.*

(4) See *Leake v. Robinson*, 2 *Meriv.* 392.

(5) See the *Rep.* p. 123.

The wife having married after the death of a former eldest son, unmarried, (3)
and during the minority, &c. of the existing eldest son, it was declared that he
would be entitled to the enjoyment on attaining 21, or marriage, upon giving
notice. The *intervening interest* in the premises and appurtenances being *undis-*
posed of, held to fall into the residue of the real and personal estates respective-
ly. (4) Portions, satisfaction of. (5)

VOL. II.

Page 125.

EARL OF CHESTERFIELD versus JANSSEN,

February 4, 1750-1.

S.C. 3Atk. 301.

NOTES AND OBSERVATIONS.

Post obit secu-
rity. Confirma-
tion, &c. (1)
A. aged 30, bor-
rows 5000*l.* on
bond to pay
10,000*l.* if he
survives B. aged
78. A. sur-
vives a year and
eight months,
having on death
of B. confirmed
(1) the bargain
by a new bond,
&c.

On the principal case, see per Lord *Redesdale*,
C. in *Lukey v. O'Donnel*, 2 *Scho. & Lefroy*, 472.

(1) As to subsequent transactions not amount-
ing to confirmation, see in *Wood v. Downes*, 18
Ves. 120, &c.

(2) See also *Hill v. Cailloret*, 1 *Ves.* 122; *Hen-*
ley, v. Axe, 2 *Bro.* 17; and *Whartons v. May*,
5 *Ves.* 271 (affirmed on appeal, *Dom. Proc.* 1808).
But notwithstanding the favourable nature of
some of these cases, the Courts of Equity, with a
most

most salutary regard for the protection of the public, have always refused to lay down any general rule, marking the bounds of such bargains for expectancies, as might be considered fair, or otherwise. See 2 Ves. 144, 149, 155, and 158. They will therefore subject every instance of the nature brought before them, where there is alleged to have been the least degree of distress, inexperience, or ignorance on the side of the contracting party, to the most severe scrutiny. See the last-mentioned references, and 2 Ves. 151, bottom.

It is observable, that the instances in which *post obit* securities have been sustained in Courts of Equity are very few, and have been even more so of late years; as also that the very term is "*nomen odiosum*," and suspicious of fraud. It seems, indeed, that the parties who are induced to engage in taking such securities, however innocently, or however even kind they may have been, in extricating a friend from his embarrassments by means of the transaction, will yet not at all be authorized in complaining of the *delay*; which (arising from the enquiries) *keeps them out of their money*; or most probably receiving no more eventually than the amount of the money advanced, with interest. As to the *delay*, it may be sufficient to reflect, that since public utility has made our Courts of Justice affix a stigma to these transactions, the notoriety of it should have operated by way of caution; whilst a just ground of suspicion must be attended with all the consequences of strict investigation.

The Author, by way of illustrating the latter observations, has annexed an accurate report from his own notes, and from the pleadings, &c. of the case

E. of CHESTER-
FIELD
versus
JANSSEN,
Feb. 4, 1750-1.
[298]

&c. freely; and
paying part.
No relief given
in this case, ex-
cept as to the
penalty. (2)

E. of Chester-
FIELD
versus
JANSSEN,
Feb. 4. 1750-1.
[*299]

case of *Evans v. Chesshire*, in which he was concerned, and which came on before Lord *Eldon, C. on a motion to dissolve an injunction, November 28, 1803; January, 28, 1804; and December 7, 1804: and was afterwards heard, and ultimately determined, by Sir *William Grant*, M. R. for the Lord Chancellor, February 21, and March 21, 1806. It is inserted immediately next to this case. For the general principles on these subjects, see in the above important and thoroughly considered case of *Lord Chesterfield v. Janssen*, 2 *Ves.* 144-5, 148-9, and 155, &c. &c.; and in the cases cited on the argument, particularly *Curwyn v. Milner*, 3 *P. W.* 292, note; which Lord *Thurlow* says was perfectly free from fraud (see 1 *Brown* 9); and which therefore seems a strong case: and also *Gwynne v. Heaton*, 1 *Bro.* &c. &c. Vide also the cases referred to in *Wharton v. May*, 5 *Ves.* 45, &c. &c. *Bowes v. Heapes*, 3 *Ves.* and *Beames*, 117, &c.; with the case of *Gowland v. De Faria*, 17 *Ves.* 20: and *Peacock v. Evans*, 16 *Ves.* 512; and, more particularly, the elaborate note, 2 *Swanst. Rep.* 139, &c.

Lawley v. Hooper, cited p. 129, is in 3 *Atk.* 278. *Shepley v. Woodcock*, cited p. 130, is in 2 *Atk.* 535.

Vide Townsend
v. Lowfield,
antea 31.

As to what is observed towards the top of p. 149, as to the proposition coming from the borrower Mr. *Spencer*, and not from the Defendant who advanced the money, Lord *Eldon*, C. said in *Evans v. Chesshire* (reported in the next page), "that the first proposition seeming to come from the borrower, in most of the cases, as it did (he believed fairly) in the one before him, was of no possible weight in his lordship's mind; since he had

" had always observed, in his long experience, that
 " artful men took particular care to let the first
 " mention of any distinct proposal of the kind thus
 " originate." See the case of *Townsend v. Low-*
field (1 *Ves.* 35), from *Reg. Lib. antea*, p. 31 ;
 where the Defendant stated the proposal origi-
 nated with the borrower ; and from whence the
 note refers to the Lord Chancellor's observation
 as above.

E. of CHETSTER-
 FIELD
 versus
 JANSSEN,
 Feb. 4, 1750-1.
 [*300]

EVANS versus CHESHIRE,

Rolls.

In Chancery, November 28, 1803; January 28,
 1804; December 7, 1804; February 21; and
 March 21, 1806.

The bill was filed on behalf of *Charles Evans*,
 Esq. unto whom certain estates had descended,
 subject (as real assets) to the claims of the De-
 fendant, as obligee in the *post obit* bond in ques-
 tion, upon the death of his brother *William*
Evans, the obligor, who had formerly been a
 Captain in the Anglesey Militia. It was framed
 with the usual allegations, as applied to the cir-
 cumstances ; and prayed that the bond might be
 declared fraudulent and void, that it might be
 delivered up to be cancelled ; and for an Injunc-
 tion in the mean while.

The Defendant, Mr. *Cheshire*, had long been
 an officer in his Majesty's service, and was a Cap-
 tain in the army immediately previous to the
 loan and execution of the bond. This instrument
 being in consideration of an advance of 300*l.* was
 conditioned for the payment of 600*l.* upon the
 event of *William Evans* surviving his father;
 'but

Post obit
 transactions.

EVANS
versus
CHESHIRE.
[*301]

*but was in any other case to be void. *William Evans* survived his father by the space of *about six months only*, and had never disputed the fairness of the transaction. He, however, being dead, and the Plaintiff, his brother and heir, refusing to pay the amount of the condition, thus become absolute, Mr. *Cheshire* was under the necessity of bringing an action for it; which being in a course of trial for the Summer Assizes in 1803, the suit was instituted, and the common injunction obtained for want of an answer. A full answer being put in, the matter was brought on, *for the first time*, on the last day of Michaelmas Term, 1803, upon a motion to dissolve the injunction on the merits disclosed by the answer; when the facts, *as then* stated on the record, appeared, in substance, to be these:—That the deceased obligor, having led an extravagant and dissipated life, and being in prison for debt at Winchester, but being entitled in remainder expectant, on the death of his father, to an estate of considerable value in Wales, became acquainted with the Defendant about three or four weeks before the execution of the bond in question; and about ten days after their first acquaintance, informed the Defendant, that, before their having first met, he had been negotiating a loan of 900*l.* with some persons in London, whose terms were most obviously exorbitant; upon which occasion *W. E.* said, that considering the price of stocks was then low, &c. he should not have thought a proposal for him to pay double for money to be then advanced, in the event of his surviving his father, would have been unreasonable. That upon this occasion, nothing whatever occurred as to the Defendant

[302]

fendant lending *W. E.* any money; nor had he the least idea of it. That soon after this *W. E.* very earnestly requested the Defendant to lend him sufficient money to enable him to be extricated from prison, and to return to and procure the assistance of his father; and the more effectually to induce him to do so, informed the Defendant, that in such case the Lord Lieutenant would reinstate him in his former command in the Militia; assuring the Defendant that he would endeavour, and should be likely to prevail upon his father to let the Defendant a farm in Wales (whither Defendant wished to retire with his family), at a reasonable rent. That a Mr. *Heron*, who was a mutual acquaintance of each, but more particularly acquainted with *W. E.* interfered on behalf of the latter for the above purposes, representing to the Defendant, that if he refused *W. E.* would have recourse to usurers, after which, it was most likely, that instead of returning to his father's house, he would dissipate what should remain, or he could procure afterwards in London, amidst his former excesses; whereas, if the Defendant assisted him, there was every fair prospect of the contrary, and of his future good conduct; so that he would thereby regain his influence with his father, and might be enabled to repay the loan, and return the kind obligation by procuring the Defendant a farm, as above-mentioned. The answer stated also, that although the Defendant was for a long time unwilling to lend so much money, he was at length prevailed on, by the above inducements, and a solemn promise from *W. E.* that he would reside with his father, to lend him a sum of 600*l.*; half of which sum alone was lent upon the *post obit*

EVANS
VERSUS
CHESHIRE.

obit bond in question, the remainder being lent in consideration of an annuity [which was never made, *by the pleadings*, a subject of the suit]. The bond was executed on the 15th of July, 1799, and the consideration was paid in the presence of Mr. *Evans's* attorney and of another person also, under the immediate approbation of Mr. *Heron*. The Defendant stated his positive belief, that the 300*l.* thus paid was (under the circumstances) a full and adequate consideration; especially considering *W. E.'s* formerly dissipated life, and his long confinement in prison; *viz.* about five years: and said, that the above transaction was the only instance in which he had lent his money on any such kind of security, &c. &c.

He then stated, that at or about the time of the bond's execution, *W. E.* told him his father was upwards of 70, and was of a strong constitution: but the Defendant averred, he had since been informed, and believed, that his father was then about 74. That at the above time *W. E.* gave Defendant to believe, he himself was then aged 38; whereas, in fact, he was then about 36. He said, that considering all circumstances, he then thought the chances of survivorship were, at least upon an equality; and he submitted, that the same was in some measure proved by the event, the son not having survived the father six months. The Defendant stated, that *W. E.* having, through Defendant's kind assistance, procured his release from prison, and returned to his father, wrote about a month afterwards, desiring Defendant to betake himself and family into Wales, as there was a house in his father's neighbourhood ready for his reception. The Defendant accordingly complied

complied, and purchased furniture, &c. to a large amount, which, from *W. E.*'s failure in making good his assurances, he was obliged to re-sell at a great loss. He averred he was credibly informed, after his arrival at *Caernarvon*, that the father was believed to be a better life than *W. E.* as he was in good health, of a strong constitution, and lived regularly; whereas *W. E.* was in every respect the contrary; and that as most persons thought the father was likely to live 15 or 20 years, he, the Defendant, had made a bad bargain; inso-much, that nobody who understood such matters would have done the same: and the Defendant said, that being in consequence very apprehensive, he offered *W. E.* and other persons, the liberty of re-purchasing the security at less than the sum he had lent; but that such offers were declined. The Defendant also informed *William Evans's* father of the whole transaction and circumstances by letter, but without effect. The father died on the 15th of September, 1802, and *William Evans* on the 6th of April 1803, which was less than six months afterwards.

The Defendant therefore submitted, that under the above circumstances, the Court ought not to interpose against his security.

The cause coming on, *for the first time*, upon the motion to dissolve the injunction, as above stated, arguments, founded on the above facts, were relied on by the Defendant's counsel, as evincing him to have acted on motives, not only fair, but altogether friendly. That both the parties were military men; and that a *brother officer* was the last person in the world who could be looked upon as *an usurer*; that besides the ab-

[305]

EVANS
versus
CHESHIRE.

sence, and almost absurdity, of such a presumption, there was every reason for implying every motive of benevolence ; and particularly from the effect which had ensued, in *W. E.* having, through Captain *Cheshire's* kind assistance, been restored out of a long, and almost hopeless captivity, to the bosom of his family, wherein he had lived in ease for the remainder of his life. That *W. E.* having been thus benefited, and never disputing the justice of the Defendant's claim, even after the condition had become absolute ; and more especially having declined a direct offer of repurchasing the security before that event, at even a less sum than he had received ; together with the circumstance of the same offer having been made to the father ; it was too much for the Court to set it aside at the instance of the Plaintiff.

Lord *Eldon*, Chancellor, however, with his usual anxiety for justice, observed, that the situation of a borrower of money, under such circumstances, that is to say, the obligor's having been in prison for a space of five years, and being confined there when the transaction took place, was truly pitiable ; and *that* the more particularly, as he was at a distance from his relations, and had no kind of property whatever *in possession*. His Lordship then said, it had been alleged by the bill, and insisted on by the counsel for the Plaintiff, that Mr. *Evans's* expectancies consisted in a vested remainder after his father's life estate, and that this part of the argument had been founded on a supposed distinction between such expectancies as were *certain* to take place in possession some time or other, and such as were *merely contingent* ; whereas His Lordship did not think there

EVANS
VERSUS
CHESHIRE.

there was any necessity for that; and was not aware of any case which proceeded on any such kind of distinction. *Each instance would be strictly scrutinized in either case*; and it was undoubtedly clear, that the Court of Chancery looks with a most jealous eye upon every contract with a person in distress; and that it is particularly vigilant when the parties are bartering in respect of property which is not in possession. His Lordship then observed, that the argument, founded on the original application for a loan upon a security of such a nature, appearing to come from the *obligor*, and not from the *Defendant*, did not weigh much with him; since, in his long experience in Courts of Justice, he had always taken notice, that *the lenders of money always took great care that the first proposition should be detailed as coming from the borrower, or distressed man*. His Lordship said he would not enter into calculations of the value of the sum, which, according to the tables of the annuity offices, ought to be secured under such a risk for the advance of 300*l.* The bill stated it at 450*l.*; and Mr. Owen, for the Plaintiff, suggested it in his argument at about 416*l.* Neither would he much dwell upon the Defendant having taken it at 600*l.* or double the sum advanced. But His Lordship said, he should take up the case on that broad general principle which the Court had always acted on; namely, *that it will watch, with a most jealous eye, and will scrutinize with the utmost severity of attention, every circumstance in each case brought before it, where it appears that a party has been dealing with a distressed person for his expectancies*: and that as he thought

[307]

EVANS
VERSUS
CHESHIRE.

there was enough of that principle in the case before him, he would maintain the injunction until the hearing.

Some short time after this, the Defendant tendered an issue at law to the Plaintiff upon the fairness of the transaction; and (though the Plaintiff could not in strictness be compelled to accept it) thereby shewed his readiness to have it thoroughly scrutinized by every means of evidence in a Court of Law. The Plaintiff, nevertheless, refused the offer, and the Lord Chancellor observed, that the Courts of Law were, in his opinion, inadequate to the complete investigation of matters of this nature. His Lordship directed judgement to be given in the action, and a release of error.

Some time after this, the Plaintiff amended his bill, and introduced some charges relative to *William Evans's* life having been insured; which gave Mr. *Cheshire* also the opportunity of explaining some matters by his answer to the amended bill, even rather more circumstantially than he had done before.

He stated in this, that his regiment being quartered at Winchester in May 1799, he was in the following month arrested, and became a prisoner for debt in Winchester Gaol, where his acquaintance commenced with the Plaintiff's deceased brother, who was in a like situation. That his feelings being consequently hurt*, he was de-
termined

* These circumstances were not stated in the answer to the original bill, or even intimated to the Counsel who prepared it, owing to the natural repugnance felt by a gentleman of the army to publish his having been under an imprisonment for debt. In point of fact, however, these circumstances are the farthest

terminated to extricate himself, and discharge his debts by the sale of his commission, and intended to live upon the surplus, with his family, in retirement. He sold his commission accordingly, the knowledge of which induced *William Evans* to request a loan, under the circumstances he had before stated.

EVANS
VERSUS
CHESHIRE.

The Bond was executed in the subsequent month of July, when they were each of them prisoners for debt. He denied, as he had done before, every charge of fraud, undue conduct, or unfair intention ; and he stated all that had taken place relative to insurances, either on the *post obit* bond, or on the annuity, in the same manner as it afterwards appeared verified by the Master's Report [see *post*]. He averred his belief, that it was the sincere intention of *William Evans* to have satisfied the full amount of 600*l.* due upon the bond, without any kind of litigation ; and that he would have done so had he lived, and would by no means have traduced and harassed the Defendant as the Plaintiff had done.

He submitted, therefore, upon the whole, that inasmuch as the original transaction was not only totally free from fraud or suspicion, but was intended, and had the effect of liberating *W. E.* from prison, and restoring him to his friends ; inasmuch also as it was in his life-time made known by the Defendant to his father and other friends, who had an offer of re-purchasing the security, at even less than the original advance of 300*l.* ; and as *W. E.* survived his father by a space of less farthest from derogating from the Defendant's character ; and indeed tend to elucidate the fairness of his conduct in the above transaction very particularly.

[309]

than

EVANS
versus
CHESHIRE.

than six months only, which proved the chances equal, he, the Defendant, had been already more than justly aggrieved by the Plaintiff; and that notwithstanding the unfavourable nature of the security he had, *inadvertently*, been induced to take, he ought to be permitted to recover the amount of the condition, or the sum of 600*l.* and the interest accrued thereon from the delay; and that the bill ought to be dismissed with costs.

Another motion to dissolve the injunction was made on the 7th of December, 1804, upon this state of the pleadings; but the Lord Chancellor refused it, saying he considered the advance of the money on this bond, and of a like sum in consideration of the annuity, as being in fact *one transaction*, since the advances were made at the same time. His Lordship wanted also to be satisfied as to what insurances had been made, and what monies, if any, the Defendant had received on account of insurances; and he therefore directed enquiries as to these matters, both in respect of the *post obit* bond, and of the annuity.

[310]

The Master, accordingly, by his Report, dated the 30th November 1805, after stating that the consideration money for the *post obit* bond, and that for the annuity, were included in the same draft or cheque, which was duly honoured and paid; and some annuity payments; certified, that an insurance was effected on the 30th of July, 1799; and that a premium of 14*l.* 3*s.* 6*d.* was paid for it, equally between *W. E.* and the Defendant, of which premium one moiety alone was all that had relation to the *post obit* bond, the remainder being relative to the annuity.

The Master reported, that fifteen months having

ing elapsed from the expiration of that insurance, without any other having been made; and *William Evans* having in the interim broken a large blood-vessel, the latter was at length induced to concur in effecting another insurance on his life for one year; which insurance was made on the 18th of November, 1801, and was of the like nature with the former, except that the Defendant did not pay any part of the premium, though he at first expected to have done so; *W. E.* having, of his own accord, proposed to pay, and having, in fact, paid the whole of such premium, by way of recompensing the Defendant for the risk he had run, as above-mentioned. That these two insurances expired in *W. E.*'s life-time; and that no further insurance was made in respect of the *post obit* bond, by reason of the death of *W. E.*'s father; and that the Defendant had never received any thing in respect of any insurance thereupon.

• EVANS
versus
CHESHIRE.

That an insurance was made, in respect of the annuity, by the Defendant, at his own expence; and *W. E.* having died whilst it subsisted, the Defendant received the amount from the office.

The cause came on, upon the Master's Report, on the 20th of February, 1806, before the Master of the Rolls, sitting for the Lord Chancellor, when the case of *Lord Chesterfield v. Janssen* was, amongst other things, relied on for the Defendant; and it was contended, that the offer of repurchase made to *W. E.* and his father, &c. amounted to full as strong a confirmation as appeared in that case. His Honour, however, giving judgement on the 21st of March, declared it was impossible for the Defendant to be permitted to sustain his claim to the amount of 600*l.*

[311]

EVANS
versus
CHESHIRE.

600*l.* merely upon the *post obit* bond, since the only ground which takes such instances out of the application of the statutes against usury, is the risk of the principal lent ; whereas, in the present case, the Defendant would, for a part of the time, be indemnified by an insurance, of which the obligor bore half the expence ; and, in the latter instance, was entirely free from risk at the obligor's sole expence.

His Honour said, it seemed to him to have been a part of the original agreement or understanding of the parties, that *W. E.* should insure his own life ; since the Report referred to what might imply the idea, where it stated the Defendant's supposed injury by way of risk on account of *W. E.*'s life having remained uninsured for a space of fifteen months. That this certainly ought not to have been the case, and *W. E.* ought not to have had any such obligation fixed on him as to the *post obit* transaction ; and that the risk to be run, was the sole cause of the great difference in such matters between the sum advanced and the sum stipulated in a certain event to be received.

[312]

His Honour, however, added, it was contended on behalf of the Defendant, and he agreed to it, that the whole transaction of the advance of the money on the 15th of July 1799, both on the *post obit* bond, and on the annuity, must be taken together, and viewed in the same light ; and, consequently, if the Plaintiff sought to undo the first transaction, he must do so upon the terms of accounting for what was advanced for the annuity, with a deduction of the payments made in respect of it, and of the money paid for insurance.

As

As to the Plaintiff's argument that the Defendant had received the amount of the money he had advanced on the annuity from the insurance office, the Plaintiff had nothing to do with that: it might perhaps be a question with the insurance office, whether the Defendant should not be a trustee in respect of what he should thus recover, after having received the amount under his insurance (though that would be very doubtful, and he knew no case of the sort); but the Plaintiff had no interest in this, and ought only to be relieved against the *post obit* bond, upon the terms of the Court's taking into consideration the 600*l.* advanced on the two several securities.

The Court therefore declared, that the *post obit* bond, and annuity bonds, given by *W. E. &c.* ought to be considered only as a security for the sum of 600*l.* actually lent and advanced on the two several securities.

The Court therefore declared, that the *post obit* bond, and annuity bonds, given by *W. E. &c.* ought to be considered only as a security for the sum of 600*l.* actually lent and advanced by the Defendant to the said *W. E.*; and decreed the same accordingly. And the Master was to compute interest on the money so actually advanced, &c. after the rate of 5*l. per cent.* from the time of its advancement. In the taking of which accounts credit was to be given to the Plaintiff for all sums of money paid by *W. E.* for insurance on his life, or otherwise, on account of the said bonds, or either of them. And upon the Plaintiff's paying what should be found due on the balance of such account, the bonds were to be delivered up

EVANS
versus
CHESHIRE.

up to the Plaintiff, &c. &c. And the injunction was to be continued until after the Master's Report, or further order, in case either of the parties should think fit to apply. The Court gave no costs on either side, and each party was to be at liberty to apply, &c.

VOL. II.
Page 160.

PRIEST *versus* PARROT, Feb. 8, 1750-1.
(Reg. Lib. 1750. B. fol. 280.)

NOTES AND OBSERVATIONS.

Grant *ex turpi causa*.
Bill for payment of a sum of money and an annuity secured by a deed poll (1) by a young woman who had been seduced by a married man, (2) in whose family she lived as companion to his wife, and who, by continuing to live with him occasioned a separation, *dismissed*; but without costs, on account of her previous good character.

(1) THE marginal note in the Report expresses a doubt whether the provision was secured by "*bond*" or "*grant*." Though the entry in *R. L.* is very short, being merely the *dismissal of the bill*, it appears from thence that a *deed poll* of the 14th April, 1735, is entered as read in evidence, besides other proofs in the cause. The strong probability of its being the instrument on which the bill was founded, is confirmed by the Author's reference to the *Registrar's Minute Book* of the day, which states the deed to have been read *for the Plaintiff*; after which there is an entry of evidence read in favour of her character.

In a cause of *Nye v. Moseley**, heard before the Vice-Chancellor on the 23d of February, 1825, the case of *Priest v. Parrot* was relied on as an authority to prove, that a bond, given by a married man to a woman, who, knowing him to

* See this case reported upon demurrer, under the name of *Nye v. Moore*, 1. Sim. & Stu. 61.

Ex informations.

be married, had cohabited with him, was necessarily void.

PRIEST
versus
PARROT,

Feb 8, 1750-1.

In order to ascertain the precise circumstances of the case of *Priest v. Parrot*, the Vice-Chancellor caused the Register's book to be searched; but all that appeared there was, that the bill was dismissed with costs.

The Record was then referred to, when it was found, that it did not appear whether the security had been given during the continuance, or after the termination of the cohabitation.

"Thus it is not certain," said the Vice-Chancellor, "that the point, which Lord *Hardwicke* is supposed to have determined in *Priest v. Parrot*, arose in that case. For if the security was given during the cohabitation, it would necessarily be bad, whether the man who gave it were married or unmarried; unless there were particular circumstances to show, that it was not an inducement to continue the cohabitation."

(2) See [3 *P. W.* 339, 2 *P. W.* 432; *Gilb. Rep.* 9 *Forr.* 153, 3 *Burr.* 1568.] *Franco v. Bolton*, 3 *Ves.* 368, &c. where several of the cases are collected. *Gray v. Mathias*, 5 *Ves.* 286. Et vide *Clarke v. Periam*, 2 *Atk.* 333. *Matthews v. L—e*, 1 *Madd. Rep.* 558.

VOL. II.

Page 162.

ANDREW *versus* CLARK, Feb. 9, 1750-1.

NOTES AND OBSERVATIONS.

Legacy to next of kin, as well as to executors, though to ever so small an amount, does not exclude the next of kin from the residue. (1) Legacy does exclude executors in general; though not universally. (2)

(1) SEE *Farrington v. Knightly*, 1 P. W. 544, also in *Bishop of Cloyne v. Young*, 2 Ves. 96. 97. *Lord North v. Purdon*, 2 Ves. 496. *Seley v. Wood*, 10 Ves. 71; and per Lord Eldon, C. in *Griffith v. Hamilton*, 12 Ves. 310.

As to the rights of executors, *et e contra*, see *Blinkhorn v. Feast*, 2 Ves. 27. *B. of Cloyne v. Young*, *ibid.* 91. *Wilson v. Ivat*, *ibid.* 166, and post 317; with the notes *antea* respectively.

(2) *Blinkhorn v. Feast*, 2 Ves. 27. *et antea* 262.

Page 162

DUHAMEL *versus* ARDOVIN,
February 11, 1750-1.

(Reg. Lib. 1750. A. fol. 196.)

NOTES AND OBSERVATIONS.

Testator reciting his intention to dispose of all his property, and that his daughter was likely to die [of a violent distemper], left his wife, if she did die, the residue and dividends

(1) LORD *Hardwicke* is decisively clear in the Judgement as to the testator's intention to crease his wife's income in case of the very probable event happening *after* the period of his own death, and during her own lifetime without issue.

The peculiarity therefore of this case, frees it from the difficulties which existed in *Cambridge v. Rous*, 8 Ves. 12. 21, &c. and in the cases therein referred to.

(2)

(2) The bill of the daughter's husband, as her administrator, was therefore dismissed; but without costs.

DUNHANEL
versus
ARDOVIN,
Feb. 11, 1750-1.

dends of such property; but if his daughter lived, directed that his wife should only have her dower; giving the residue and dividends to that daughter. If she died without children, testator gave his brother "all that should be left." The daughter survived the testator, but died of the same illness, without issue.—Held that the mother was still entitled for life; and that the words "what should be left," constituted a good residuary bequest to the brother. (2) Costs.

BYAS versus BYAS, Feb. 15, 1750-1.

VOL. II.

Page 164.

(Reg. Lib. 1750. A. fol. 353.)

NOTES AND OBSERVATIONS.

(1) VIDE *Judd v. Pratt*, at the Rolls, 13 Ves. 168. 178. Affirmed on appeal by Lord *Eldon*, C. 15 Ves. 390. See also Mr. *Scriven's* very useful work on Copyholds, pages 161, 162, &c.

(2) Vide *Church v. Mundy*, on the appeal before *Eldon* C. 15 Ves. 396. 404, &c.

(3) As to where there has been a surrender, see *Goodwyn v. Goodwyn*, 1 Ves. 226. As to where not, see *Scriven on Copyholds*, 166, and several of the cases collected *ibid.* 134, 5, 6, which are referred to by the subsequent notes.

(4) See many of the principal cases collected in *Scriven on Copyholds*, 134.

(5) See most of the material cases collected in *Scriven on Copyholds*, 134, 5.

(6) See a variety of the cases collected in *Scriven on Copyholds*, 135, 6. Et vide *ibid.* 162, 3, as to the distinction made in favour of creditors; and the

Copyholds.

Testator seized of freehold, and of copyhold estates unsundered, gives "all the rest, &c. of his estate, real and personal, to his wife, her heirs," &c.

Held clearly, that the copy-

[316]

holds thus unsundered did not pass in Equity, there being nothing to designate such express intention; and sufficient to answer the words used of "real estate" without them.

Byas
versus
Byas,
Feb. 15, 1750-1.

them. (1)
It would have
been otherwise
in this case, if
testator had not
had any freehold
estate (2), or
having both, had
expressly de-
vised both, even
although the
copyhold was
unsurrendered.

(3)
In cases where
copyholds are
clearly meant to
pass, but are un-
surrendered,
the want of such
surrender sup-
plied only in
three cases, viz.
for the benefit
of a wife (4),
children (5),
and creditors.

(6)
Distinction be-
tween the sup-
ply of a surren-
der in favour of
wife or children,
and creditors.
Necessity of
surrenders now
dispensed with
by stat. 55 Geo.
3. ch. 192.

the late cases, which have gone much further than
Lord Hardwicke in *Ithell v. Bean*, 1 *Ves.* 215;
antea 114.

It was observed as to the principal case of *Byas*
v. Byas, by the Master of the Rolls, in *Judd v.*
Pratt, 13 *Ves.* 178, that "the heir might have
" been called upon to make his election; though
" it seems never to have occurred to any one to
" put the case on that ground."

The case of *Judd v. Pratt*, as to its material
features of the devise, and of there being freehold
as well as copyhold lands, can hardly be distin-
guished from the principal one, see 13 *Ves.* 168.
178. And Lord Eldon, C. upon the appeal of it,
says, that "*Byas v. Byas* was a strong authority."
His Lordship also adds, it was relied on by
Lord Thurlow, C. in *Lindopp v. Eborall*, 3 *Bro.*
188. Vide in *Judd v. Pratt*, on the appeal, 15
Ves. 394.

It is to be observed, that a considerable altera-
tion has been lately made in the law relative to
copyholds, by the stat. 55 Geo. III. chap. 192,
which dispenses with the necessity of a surrender,
in respect of all testators dying after the passing
of that act, upon payment by the persons enti-
tled, or claiming, of all duties, fees, &c. that would
have been due and payable in case a surrender
had been made. It is also to be noticed, that it
seems most advisable to surrender to the use of the
will in every case, where it can be done, notwith-
standing the benefit of the act. See *Scriven on*
Copyholds, 129. The act in question is inserted
ibid. p. 610.

With regard to what is said in the Judgement
of the principal case, towards the bottom of page
165,

165, in answer to the argument, attempting to resemble the devise to *creditors*; it may be also observed (*inter alia*) that the doctrine of election is not applicable to creditors; see *Kidney v. Coussmaker*, &c. 12 *Ves.* 136. [317]

BYAS
versus
BYAS,

Feb. 16, 1750-1.

Though, in the principal case, the bill was dismissed, it was *without costs*. *R. L.* Costa.

WILSON *versus* IVAT, Feb. 16, 1750.

(*Reg. Lib.* 1750. *B. fol.* 495.)

VOL. II.

Page 166.

NOTES AND OBSERVATIONS.

Sir, J. Strange,
M. R.

(1) THE report is *incorrect* in stating the wife to be "*residuary legatee*." The testator only gave her "all his household goods, stock of cattle, monies, and securities for money, whatsoever, and wheresoever."

Testator having appointed his wife and the Defendant executors, and given his wife certain specific articles (1), and his wife having died in his lifetime, the Defendant held entitled to the whole residue, comprising those articles as lapsed (2); and the bill of the next of kin was dismissed; but without costs.

The Defendant, "in regard he was the surviving executor, &c. and had no specific legacy, or any thing else whatsoever, given him by the testator's will; as a recompence or satisfaction for his trouble in respect of the executorship, submitted, whether *the surplus and residue, or such other part* of the testator's personal estate, of what kind or nature soever, *as was not comprised or included under the aforesaid denominations specifically mentioned in the will*, ought to be distributed amongst the next of kin, &c. or not; and whether the testator did not intend that he should have a beneficial interest in such other part or surplus of his personal estate not specifically devised or given away as aforesaid;

Devise of a real estate in fee to the wife of surviving executor, no objection to his taking the residue of the personality.

"and

WILSON
versus
IVAT,
Feb. 16, 1750.
[318]

personalty.
Sir J. Strange
M. R. held that
executor, *as*
such, takes all
such as is not
disposed of,
whether by
lapse or other-
wise, unless a
contrary intent
is clearly shewn;
calling him a
“legal residu-
ary legatee.”

Distinction
between the
executor, *as*
such, taking
lapsed residue,
and a lapsed
legacy—
Held that he
does not take
the former—
As to the latter,
quære.

“and also, whether he was not entitled thereto, “by operation of Law as executor.” The bill was dismissed without costs, as to the personal estate *generally, without making any distinction.*
R. L.

(2) Lord Eldon, C. in *Dawson v. Clarke*, 18 Ves. 254, is reported to have observed, that “the proposition of the appointment of executors giving them every thing not disposed of,” is incorrect; and that the “strongest way of putting it, that such alone must pass to him as the testator *meant* to dispose of;” his Lordship *expressly negating the case of lapse*. Although this is incontrovertible in the case of lapse of a residue (which comprises the whole subject matter) agreeably to *Bennet v. Batchelor*, 3 Bro. 28, and 1 Ves. jun. 63; yet the principal case of *Wilson v. Ivat*, certainly seems an express decision to the contrary, as to *lapse in the case of a mere legacy*. The reasoning of the Master of the Rolls there seems also very strong; add to which the opinion of Lord Thurlow, C. in 1 Ves. jun. 67. See also *Jackson v. Kelly*, 2 Ves. 285. The Author of these notes is doubtful whether he is right in supposing there is *actually* a difference of opinion between those great Judges *on the lapse of a mere legacy*, or whether the present Lord Chancellor’s observations are *to be confined to the lapse of a residue*, as exemplified in *Bennet v. Batchelor*.

It is to be observed, that in the principal case, the specific articles bequeathed to the testator’s wife, having lapsed by her intermediate death, fell by *operation of Law* into the residue; to *whomsoever belonging*; and that the residue in
general

general was held to have vested in the executor both by operation of law and beneficially, *without any distinction*; although the very point in question was raised by the pleadings, and argued at the Bar, as appears in the extract from *R. L.* and in the report.

WILSON
versus
IVAT,
Feb. 16, 1750.
[*319]

Lord *Thurlow*, C.'s observations 1 *Ves.* jun. 67, seem to confirm these sentiments.

(3) Nor even by a *pecuniary legacy* to his children, &c. See in *B. Cloyne v. Young*, 1 *Ves.* 91.

Executor not excluded from the residue by a real estate given to his wife. (3)

As to the cases in general between executors and next of kin relative to the residue, see the notes on *Blinkhorn v. Feast*, and *Bp. Cloyne v. Young*, *antea* (262), and (285).

BAKER versus BAKER, Feb. 19, 1750.

(Reg. Lib. 1750. A. fol. 285.)

VOL. II.

Page 167.

NOTES AND OBSERVATIONS.

(1) SEE *Gordon v. Gordon*, 1 *Merivale*, 141, and *Lord Woodhouselee v. Dalrymple*, 2 *Merivale*, 419.

The bill charged "that the daughter not having made the Plaintiff a party to that suit, it did not appear she had any son, but it was alleged that she had not any lawful issue of her body; which the Plaintiff charged was an imposition upon the Court, inasmuch as the Plaintiff was then an infant, and had no notice of the suit; and as he was not made a party thereto, it was not before the Court to determine whether the devise in favour of the Plaintiff, as

Bastard—Question as to whether a bastard could take under the denomination in a will, of "eldest son," by way *descriptionis personæ* (1), the testatrix knowing of his existence, and believing that there was no lawful issue.

z

"her

BAKER
versus
BAKER,
Feb. 19, 1750.
[320]

“ her eldest son, was a good devise to him ; for
“ the testatrix was before, and at the time of
“ making her will, well acquainted with the
“ situation and circumstances of her daughter,
“ and of her family, and knew, or had good reason
“ to believe, that she had no lawful issue; but that
“ she had children by *Baker* then living, particu-
“ larly the Plaintiff her eldest son; which the tes-
“ tatrix was made acquainted with from time to
“ time by her daughter, by means of several let-
“ ters before the making of the will.” The mat-
ter was afterwards compromised. *Reg. Lib.*

In cases of this nature, where *no persons strictly answer the description of children, sons, &c.* The Courts admit evidence dehors the will, &c. to ascertain whether there were any *who had acquired the reputation of children, &c.* See *Lord Woodhouselee v. Dalrymple*, 2 *Meriv.* 419. *Wilkinson v. Adam*, 1 *Ves.* and *Beames*, 422, 458, &c. *Swaine v. Kennerley*, *ibid.* 469. *Beachcroft v. Beachcroft*, 1 *Maddox Rep.* 430. A bequest to such [illegitimate] children as a woman may have *by any particular person*, is not good; *Metham v. Duke of Devon*, 1 *P. W.* 529. *Earle v. Wilson*, 17 *Wes.* 528. But a bequest to the natural child of which a woman is *ensient*, *without reference to any person as the father*, is sustainable. *Gordon v. Gordon*, 1 *Meriv.* 141.

MORRIS *versus* DILLINGHAM, *et e Contrd*,
February 20, 1750.

VOL. II.
Page 170.

(Reg. Lib. 1750. B. fol. 667 and 669.)

Rolls.—Sir J.
Strange, M. R.

NOTES AND OBSERVATIONS.

(1) It appears that the demand, however favoured by the M. R. was ultimately waived. R. L. 669.

Demand of interest on arrears of an annuity waived, as not likely to prevail (1) under the circumstances.

The marginal note of Mr. Vesey in the three first editions must be attended to *with much caution*.

Though the Court has given interest upon sums reported due, &c. *under very peculiar circumstances*, as in *Bickham v. Cross*, 2 Ves. 472 (as to which see 2 Ves. jun. 160. 164, and 166.); it has in general been *disinclined* to give such directions; and Lord Hardwicke thought himself obliged to *refuse* giving interest on the arrears of an annuity in a very hard case, and where he would have done it *if he could properly*. See the case of the Duchess of Wharton, in *D. Bedford v. Coke*, 2 Ves. jun. 166, 167, and 1 Dick. 178. Lord Thurlow, C. directed interest on such arrears, in *Morgan v. Morgan*, 2 Dick. 643; taking the distinction, however, that the fund was not only effective, but also that the party had been debarred from her intention of enforcing payment of the annuity at law, by an Injunction. Vide also the note on [another branch of the cause of] *D. of Bedford v. Coke* (2 Ves. 116), *ante* (293). There is also a note of this last case, 1 Dick. 178,

[321]

MORRIS
versus
DILLINGHAM,
et c. Contrà,
Feb. 20, 1750.

and it is mentioned by Lord Loughborough, C. from Lord Hardwicke's notes in *Creuze v. Hunter*, 2 *Ves.* jun. 166, 167.

VOL. II.
Page 170.

E. of STAFFORD versus BUCKLEY,
February 23, 1750.

(Reg. Lib. 1750. A. fol. 321, entered "E. of
Stafford v. Cantillon.")

NOTES AND OBSERVATIONS.

Annuity in fee
(1) granted by
K. Ch. II. out of
Barbadoes du-
ties, is not a rent
nor realty; nor
within the sta-
tutes either of
frauds, or de
donis, &c.
Therefore being
settled on A.
"and the heirs
of her body,"
it was held to
amount to a fee
simple condi-
tional at the
common law,
the remainder
over being void;
and that A.
having had

[322]
issue, might bar
the possibility
of reverter.
Personal estate
incapable of en-
tail. (2)
A particular

sum

(1) VIDE *Smith v. Pybus*, 9 *Ves.* 566, and the cases therein cited, more especially the *Countess of Holderness v. Lord Carmarthen*, 1 *Bro.* 377.

(2) See the cases referred to by the Index.

The case of *Lord Beauclerc and Miss Dormer*, cited p. 174, is in 2 *Atk.* 308, which Lord *Thurlow*, C. observed was a good report. See 1 *Bro.* 190. *Bagshaw v. Spencer*, cited p. 175, is in 1 *Ves.* 142, and 2 *Atk.* 570. 577. *Snell v. Read*, cited p. 182, is in 2 *Atk.* 642; vide page 646, &c. *ibid.*

The case of the New River Company, cited also p. 182, is in 3 *Atk.* 336; &c.

See the Judgement, p. 177. It should be observed, that money secured upon turnpike tolls is within the Mortmain act; see *Knapp v. Williams*, 4 *Ves.* 430, note; also *House v. Chapman*, *ibid.* 542. So is money secured by an assignment of Poor's Rates and County Rates; *Finch v. Squire*, 10 *Ves.* 41.

As to some points mentioned p. 179 and 180, see in *Williams v. Jekyll*; &c. 2 *Ves.* 681. 683, &c.;

&c.; and *Goodwyn v. Goodwyn*, 1 *Ves.* 226, 228, *et antea*, (117); and *Bailis v. Gale*, 2 *Ves.* 48. *et antea* (268). E. of STAFFORD
versus
BUCKLEY,
Feb. 23, 1750.

Notwithstanding what is said in p. 180, that a possibility is not grantable over by a subject, it is yet devisable where coupled with an interest; see in *Perry v. Phelps*, 1 *Ves.* jun. 254, and the notes.

sum being
given for main-
tenance will
not bar the
party from be-
ing entitled to
the surplus

profits. Mortgages of Turnpike Tolls, Poor's Rates, and County Rates, are within the statute of Mortmain.

VAUGHAN versus FARRER, Feb. 26, 1750.

VOL. II.

(Reg Lib. 1750. B. fol. 545.)

Page 182.

NOTES AND OBSERVATIONS.

(1) THIS doctrine, however, is now over-ruled, see *Ambler* 616. 751. 752; 1 *Bro.* 444, note; 6 *Ves.* 404. 407, &c.; 8 *Ves.* 186. 191; 9 *Ves.* 535, &c. *et postea* 404, in the note to *Attorney General v. Bowles*, which is in 2 *Ves.* 547.

Mortmain, stat.
Geo. II. c. 36.
Bequest of resi-
due of personal
estate in trust,
"to erect an
hospital," not
void; it not
being given to
be laid out in
land.—Held,
that in such
case, the word

The case referred to p. 184, is *Mogg v. Hodges*, 2 *Ves.* 52, *antea* 269.

The *Attorney General v. Meyrick*, cited page 184, is in 2 *Ves.* 44, *antea* 267.

The case mentioned at the top of page 185, is *Cantwell v. Baker*.

(2) See p. 183 and 186. [In the case of a bequest of a chattel, or term, the words "*dying without issue*," shall be considered with a double aspect, comprising two contingencies; the one, if the person die without leaving issue, the other, if he die, leaving issue, which afterwards die with-
out

[323]
"erect" did
not of necessity
imply "to
build;" but only
imported the
foundation of a
charitable insti-
tution meta-
phorically.

VAUGHAN *versus* FARRER, out issue. *Per Buller, Just.* Note to the Irish edition of *Vesey*.]

Feb. 26, 1750.

phorically. (1) An express estate for life not enlarged by implication, *unless necessary*; as to preserve the clear intent for a line in succession. The words "dying without issue," construed in respect of *personal* estate, in the popular sense; so as to preserve the limitations over. (2)

VOL. II.

PEACOCK, *versus* MONK, Feb. 27, 1750.

Page 190.

(*Reg. Lib.* 1750. B. fol. 299.)

S. C. antea 80.

NOTES AND OBSERVATIONS.

Baron and
Feme.

Wife, having specific effects to her separate use, disposes of her separate property by will. After her death, her husband sells part of these effects, and dies; his representative is accountable to the wife's administratrix with the will annexed. (1) Account of wife's separate estate, or pin-money, never

[324]
carried back beyond the year. (2)

(1) ADMIRAL *Lestock* had, after his wife's death sold and disposed of several specific goods and effects, which had been settled to her separate use. An account was directed as to these; and the Defendant, his executor, was ordered to satisfy the amount of what should be so found due, out of the Admiral's assets, to the administratrix of Mrs. *L.* with her will annexed. *R. L.* 303.

(2) Vide also 2 *Ves.* 7, and 2 *Madd. Rep.* 286, note.

(3) Lord *Hardwicke*, though laying down the rule generally thus, suggests a possible exception, pages 191, 192.

(4) See p. 191, et vide *Wright v. Lord Cadogan*, 1 *Bro. P. C.* 486, octavo edition, and 6 vol. 156, folio edit. Vide 1 *Fonb. T. E.* 91, &c.

(5) See nevertheless *Whistler v. Newman*, 4 *Ves.* 129, and *Hyde v. Price*, 3 *Ves.* 437.

A wife may dispose of her separate personal estate by act in her lifetime, or by will. As to her real estate, all that is not properly conveyed descends to her heir

heir; and no part of it is bound by any bare agreement, in so far as respects her heir. (3)

As to the execution of powers by Femmes Covertes. (4)

Said, that if a Feme Covert borrows money on the security of her separate estate, her declarations, as such debtor, may be read in evidence. (5)

ORR versus KAINES, March, 8, 1750.

(Reg. Lib. 1750. B. fol. 210.)

NOTES AND OBSERVATIONS.

(1) SEE per Lord Hardwicke C. in *Moore v. Moore*, 2 Ves. 600. Even in the case of the executor's insolvency, legatees are not always bound to refund. The distinction seems between the cases where there was originally a deficiency of assets, and those where the executor has wasted them; vide *Walcot v. Hall*, 1 P. W. 495, note to the fifth edition, and S. C. 2 Bro. 305. It is stated in Mr. Bell's edition of *Brown*, that Lord Redesdale's MS. notes refer to a case of *Malin v. Hooper*, 19th March, 1797, and add, that "where a legatee ought to refund, it must be in cases where the payment at the time of making it would amount to a devastavit."

circumstances. A legatee paid by an executor voluntarily, not obliged to refund to the rest; except in the case of his insolvency. (1)

VOL. II.
Page 193, 4.
Rolls.

Sir. J. Strange,
M. R.

Executor not having exhibited an inventory, and having paid all legacies but one, is a sufficient foundation to charge him with assets as to that legacy, though not positively conclusive.

An inventory solemnly exhibited not conclusive on executor, if there has been a variation of

LORD

[325]

VOL. II.

Page 198.

LORD TEYNHAM *versus* WEBB, May 2, 1750.

(Reg. Lib. 1750. B. fol. 369.)

NOTES AND OBSERVATIONS.

Vesting,
Grandmother
under a power
creates, by deed,
a term to com-
mence after her
death, for rais-
ing money for
younger chil-
dren; as
their father
should ap-
point:

If no appoint-
ment, equally;
if but one, be-
sides the eldest,
then to that one;
if none except
the eldest, then
to him; if no
eldest son, then
to her own exe-
cutors. At the
date of the deed
there was one
grandson and
one granddaugh-
ter. The father
afterwards had
another son,
and died with-
out appoint-
ment.

The eldest son
having died un-
der age, held
that the whole
sum belonged
to

(1) LORD *Hardwicke* determined this point, not merely on the intent (as to which see p. 211), but on the authority of *Doleman v. Chadwick*, 2 *Vern.* 528, which has frequently been approved, and acted upon. See the principal case, p. 210, &c. and *Chadwick v. Doleman*, 528, &c. Mr. *Raithby's* edition, which (*inter alia*) cites *Broadmead v. Wood*, 1 *Bro.* 77.

Vide also in *Hubert v. Parsons*, 2 *Ves.* 261, &c.

(2) See page 203, note. Also in *Coleman v. Seymour*, 1 *Ves.* 210. *Emery v. England*, 3 *Ves.* 232. *Lady Lincoln v. Pelham*, 10 *Ves.* 166. *Bowles v. Bowles*, *ibid.* 177. *Sed vide Matthews v. Paul*, 3 *Swanst.* 328.

As to the instance mentioned in the argument, p. 199, of a sum to younger children, payable at a future time, see 2 *P. W.* 612, note; and *Bolger v. Mackell*, 5 *Ves.* 509.

Hodgson v. Rawson, cited *ibid.* is in 1 *Ves.* 45, and 2 *Atk.* 127.

Graham v. Lord Londonderry, cited *ibid.* is in 3 *Atk.* 393.

Hall v. Terry, mentioned p. 202, as cited in *Hodgson v. Rawson*, 1 *Ves.* 44, is much better reported, 8 *Vin. Ab.* 383. pl. 36, than by *Atkins*. Lord *Thurlow*, C. disapproved of *Hall v. Terry*, vide 1 *Bro.* 194. See the note on *Hodgson v. Rawson*, *antea* 37.

(3)

*(3) *Lomax v. Holinden*, cited p. 205, is in 1 *Ves.* 290, *et antea* 152.

As to the points mentioned under this head, p. 208, see *Gordon v. Levi*, *Amb.* 364. *Doe v. Martin*, 4 *T. R.* 39, and *Smith v. Carrington*, 2 *Ves.* jun. 698, &c. Also *Loder v. Loder*, 2 *Ves.* 530.

(4) Vide *Hubert v. Parsons*, 2 *Ves.* 261.

Beal v. Beal, cited p. 210, is in 1 *P. W.* 244. Vide *ibid.* 451. 487, and 2 *Atk.* 456. *Hele v. Bond*, cited p. 211, is in *Prec. Ch.* 474, and 1 *Eq. Ca.* *Ab.* 342.

pended, in general, by a power to appoint. (3) Portions not to be raised for the representatives of a child, who died before it was naturally required. (4)

L. TEYNHAM
versus
WEBB,
May 2, 1750.
[*326]

to the daughter,
and that the
younger son,
having thus be-
come an eldest
son, was exclud-
ed. (1)

Elder son un-
provided for
considered as a
younger. (2)

Vesting not sus-

LLOYD versus TENCH, March 6, 1750.

(Reg. Lib. 1750. B. fol. 283.)

VOL. II.

Page 213.

NOTES AND OBSERVATIONS.

(1) VIDE also *Davers v. Dewes*, 3 *P. W.* 50. *Bowers v. Littlewood*, 1 *P. W.* 595. *Durant v. Prestwood*, 1 *Atk.* 454, and *Stanley v. Stanley*, 1 *Atk.* 455. Under a Devise to the descendants of *F. L.* in a certain district, grandchildren and great grandchildren take *per capita*, *Crosley v. Clare*, 8th and 10th April 1761, from a valuable MS. note, 3 *Swanst.* 320. n. which mentions its being very imperfectly reported in *Ambler* 397.

(2) In this case originally, letters of administration had been granted to the Defendant *Tench*, under which he had received part of the effects. These were afterwards revoked for want of jurisdiction,

Statutes of Dis-
tributions.

Where no issue,
nor brother or
sister of an in-
testate, an aunt
takes under the
statute equally
with nephews
and nieces.

In such case
they take *per*
capita, and *not*
per stirpes. (1)

Bill of inter-
pleader dismiss-
ed with costs,
where the ques-
tion

LLOYD
versus
TENCH,
March 6, 1750.

[327]
tion could be
determined in
the principal
suit. (2)

diction, and letters of administration granted to the aunt. The latter had brought an action against *Tench* for the effects thus possessed by him. *Tench* filed a bill, praying that the aunt, &c. might set forth their respective claims, and *interplead*, &c.; and for an Injunction, &c. The bill was dismissed at the present hearing with costs. *Reg. Lib.*

Wallis v. Hodson, cited p. 213, is in 2 *Atk.* 115, and *Barn. Ch. Rep.* 272.

VOL. II.
Page 216.

HAMPSHIRE versus PIERCE, March 7, 1750.

(*Reg. Lib.* 1750. *A. fol.* 319.)

NOTES AND OBSERVATIONS.

Parole evidence
admitted to ex-
plain a will,
where doubtful;
not to contra-
dict. (1)

(1) See *Goodinge v. Goodinge*, 1 *Ves.* 231; vide also 2 *Ves.* 28. *Abbot v. Massie*, 3 *Ves.* 148. *Beaumont v. Fell*, 2 *P. W.* 140. *Price v. Page*, 4 *Ves.* 680. *Smith v. Coney*, 6 *Ves.* 42. *Hunt v. Hort*, 3 *Bro.* 311; per Lord *Eldon*, C. 6 *Ves.* 397, &c. and 1 *Rop. on Leg.* 138, &c.

Page 219.

DIXON versus PARKER, March 8, 1750.

(No Entry.)

NOTES AND OBSERVATIONS.

Evidence—
Witness—
Depositions of
one Defendant
not

(1) THE depositions even of a *Plaintiff* have been read in Equity; he having been *disinterested* at the time of their having been taken. *Goss v. Tracy*,

Tracy, 1 P. W. 287. 289. Vide in *Glynn v. B. of England*, 2 Ves. 42, et antea (266); and an Order was made on motion of a Defendant to examine a Plaintiff, saving just exceptions, he consenting to be examined. *Walker v. Wingfield*, 15 Ves. 178. Et vide *Armiter v. Swanton*, Amb. 393.

As to the distinction between the examination of a bare trustee, and of an executor in trust, see in *Croft v. Pyke*, 3 P. W. 180, 181, &c. and the notes.

(2) See the note 3 Ves. jun. 38, &c. &c.

Such objection is wholly as to his incompetency.

Though a Plaintiff at Law is not allowed to examine any Defendant as a witness, one Defendant may there examine a Co-defendant. In Equity, a Plaintiff may examine a Defendant; and a Defendant a Co-defendant, but then it is on a suggestion that the party is not interested, and saving all just exceptions from the nature of the suit, &c. or in case of there being any material evidence against him, &c. &c. (1)

The statute of Frauds does not enable a party to commit a Fraud; as in the case, where a mere mortgage being contemplated, and an absolute conveyance made by one deed with the intention of a defeasance being executed by another, which never takes place, &c. &c. (2)

DIXON
versus
PARKER,
March 8, 1750.
[328]

not read in fa-
vour of another,
where the former
is at all
concerned in
interest, or a
Decree can be
made against
him.

VOL. II.

ROBINSON versus ROBINSON, March 9, 1750.

Page 225.

NOTES AND OBSERVATIONS.

Coryton v. Hellier, mentioned p. 226 and 227, is cited in *Targus v. Puget*, 2 Ves. 195.

Lomax v. Holmden, mentioned p. 228, is in 1 Ves. 290. *Penhay v. Harrel*, cited p. 230, is in 2 Vern. 370, &c.

Observe particularly Mr. Raithby's note, page 372. *Hopkins v. Hopkins*, cited p. 230, is in 1 Ves. 268, and 1 Atk. 581.

The Act of Parliament mentioned p. 231, is the 10th and 11th Will. III. c. 16.

issue, remainder over—Held an estate to H. in tail male.

CLARK

S. C. 3 Atk. 736.
Et vide Burrow.
38, and 3 Bro.
P. C. 180, 8vo.
edit. and 5 vol.
278, folio.

Devise to H.
for life and no
longer, taking
the name of R.;
and to such son
as he should
have, taking the
name; and in
default of such

[329]
VOL. II.

Page 322.

CLARK *versus* THORP, March 9, 1750.

(Reg. Lib. 1750. A. fol. 245.)

Waste by Guardian, converting antient pasture into arable, though possibly for a temporary benefit.

Page 233.

CLAVERING *versus* CLAVERING,
March 11, 1750.

(Reg. Lib. 1750. A. fol. 307.—and Reg. Lib.
1751. A. fol. 421.)

NOTES AND OBSERVATIONS.

Evidence—

The same rule of evidence at Law and in Equity as to the loss of a deed.

(1)
On liberty given to bring an action, unnecessary to order that the depositions shall be read at Law.

THIS was the sound doctrine, see 1 *Ves.* 233, &c. and *Askew v. The Poulterers' Company*, 2 *Ves.* 89. Vide, however, the note on that case, *antea* (284).

(1) The Plaintiff instituted this suit as heir in tail under an alleged settlement, after the death of his elder brother, who died without issue, and had not barred the intail, against the parties in possession, praying an account of rents and profits, &c. &c. delivery up of the settlement, &c. and of the estate. The material Defendant, who was in possession under the will of her late husband, the elder brother, alleged that he was seised in fee, and denied that any such settlement was ever executed; stating, that the Plaintiff's father was incapable of executing it as alleged, since he was not of age at that time; she admitted she had in her

* her custody a parchment writing, or deed poll, purporting to be an indenture of settlement; but insisted, that in regard it was not in fact indented, and appeared never to have been executed by any of the parties, and as it had not any attestation of its execution, it ought to be considered as a nullity, and not to operate to any of the uses therein limited. She stated, that the father having conveyed the estate to his eldest son in fee, and he having devised it, she was entitled to the possession under his will.

CLAVERING
versus
CLAVERING,
March 11, 1750.
[*330]

The bill was retained for twelve months, with liberty for the Plaintiff to bring an ejectment, the Defendants to admit the Plaintiff to be heir of the body, and not to set up any outstanding term, &c. All deeds, &c. to be produced.

The trial took place at the ensuing Assizes, when a verdict was found for the Plaintiff. The cause, coming on upon the equity reserved, stood over for the Defendants to consider, whether they would submit to a Decree according to the verdict as found, without costs on either side; or would proceed to the trial of an issue, whether a settlement, agreeable to the contents of the parchment writing, was executed or not, at the peril of costs. The Defendants submitted to a Decree. *Reg. Lib.* 1751. *A. fol.* 421, 422.

[331]
VOL. II.

Page 233.

Trust of a *chat-
tel* real for S.
for life, and im-
mediately after
her death for
the "*heirs of her
body*," with li-
mitations over.
The whole in-
terest vested in S.
As to where the
words "*heirs of
the body*," have
been held words
of purchase in
the same sense
as "*issue*." (1)

THEEBRIDGE *versus* KILBURNE,
March 13, 1750.

(Reg. Lib. 1750. B. fol. 198.)

NOTES AND OBSERVATIONS.

Withers v. Algood, mentioned p. 231, is cited
also in *Bagshaw v. Spencer*, 1 Ves. 150.

Sands v. Dixwell, mentioned *ibid.* is also cited
2 Ves. 652. *Hodsell v. Bussey*, mentioned p. 235,
and 236, is also cited 2 Ves. 652. *Butterfield v.*
Butterfield, mentioned p. 235, is in 1 Ves. 133.
154, *et antea* 81.

(1) See p. 238 of the report.

Page 239.

TICKEL *versus* SHORT, March 14, 1750.

(Reg. Lib. 1750. B. fol. 238.)

NOTES AND OBSERVATIONS.

Factor or cor-
respondent pre-
tending to in-
sure as directed,
charged as if he
had insured. But such equity does not extend to an agent employed by him
[ignorant of such deception].

THERE is no further entry of this case in *R. L.*
than *the dismissal of the bill*.

(1) See also 2 *Atk.* 252.

If merchant keeps an account current by him two years without objection, it
is considered as a *stated* account. (1)

DENTON *versus* SHELLARD, *March* 16, 1750.

(*Reg. Lib.* 1750. *A. fol.* 232.)

[332]

VOL. II.

Page 239.

NOTES AND OBSERVATIONS.

(1) THE rate of interest *now*, where interest is directed generally, is 4 *per cent.* which is called ⁽¹⁾ "*the interest of the Court.*"

As to some of the former cases on the subject, see *Bryant v. Speke*, 1 *Ves.* 171, and *Lord Trimlestown v. Colt*, *ibid.* 277.

JONES *versus* LEWIS, *March* 18, 1750.

Page 240.

(*Reg. Lib.* 1750. *A. fol.* 309.)

A Decree having been made for a general account and payment of the balance against a party who died, and his personal representative having delivered certain goods, part of the effects, to her own solicitor, to be delivered over, not answerable in the event of his being robbed of them.

Tender of the goods not incumbent on her.

She would not have been answerable if they had remained in her own possession till the accident.

KIRBY *versus* CLAYTON, *March* 23, 1750.

Page 241.

(*Reg. Lib.* 1750. *A. fol.* 299.)

(1) *VIDE* Anonymous, *antea*, 291.

The Court
will not direct
money to be

paid to a party entitled in remainder, upon the *improbability* of an intermediate event, *if such event be possible.* (1)

FULLER

[333]
VOL. II.

Page 242.

Testatrix gives by her will, legacies to all her nephews and nieces, except those therein-after named: she desires her executors to look upon all memoranda, &c. in her own hand, as parts, or a codicil to, her will; and bequeaths by the will her residue to the children of her sisters E. J. &c.
By a codicil she gives legacies to some other nephews and nieces.
Held, that the children of E. J. &c. the residuary legatees under the will, were excluded from the legacies; but that the legatees under the codicil were not, and were entitled to both.
"Testament" includes a will, codicils, &c. Instrument signifies the will alone. (1)

FULLER versus HOOPER, March 23, 1750.

(Reg. Lib. 1750. A. fol. 290 and 237.)

NOTES AND OBSERVATIONS.

(1) As to some points on these heads, see in *Crosbie v. Mac Dowal*, 4 Ves. 610.

In the principal case the question came before the Court on a petition to vary the minutes of a Decree, which was presented on behalf of the Plaintiffs. It stated it to have been declared by the Decree, "that the Plaintiffs *J. F.* and *E. S.* and the Defendant *Elizabeth Isted*, being the nephew and two nieces of the testatrix, named in her will, after the bequest of legacies of 50*l.* a-piece to certain of her nephews and nieces, were not entitled to legacies of 50*l.* a-piece by virtue thereof;" and further, that by the will, the testatrix devised "to all her nieces and nephews, children of her sisters *E. F.*; *A. Isted*; *M. G.*; and *E. C.* except those therein-after named, 50*l.* each, and directed that her executors should look upon themselves as obliged to perform any gift by inventory out of her household goods, &c. which should be found inclosed in her will; together with all memorandums which were found in her own hand; and were, at all times, to be looked upon as parts, or a codicil of that her last will, though not annexed to it in form of law:" and stating, that *Ambrose Isted*, one of the Defendants, and son of *Ann Isted*, a sister of the testatrix, was named in the will after the devise of 50*l.* each to her nephews and nieces before-mentioned

*mentioned ; and that several of the other Defendant's nephews and nieces were *named in a codicil*, under the hand of the testatrix, and that legacies were thereby given them ; from which circumstances the *petitioners apprehended* that as the codicil was declared by the testatrix to be a part of her will, *all* of such Defendants were, by the intention of the testatrix, excluded from the legacies given as above-mentioned, and that it was the intention of the Court so to have declared at the hearing. It was therefore prayed that the minutes might be rectified accordingly. The Lord Chancellor inserted the declaration prayed *in respect of Ambrose Isted only* ; and dismissed the petition as to the rest. *Reg. Lib. ubi suprà*. It appears from the will, stated in *Reg. Lib.* (same year, fol. 327,) that *Ambrose Isted* was not specified therein *by name*, but that he was *entitled to a share of the residue thereby bequeathed, as one of the children of the testatrix's sister, Ann Isted*.

FULLER
versus
HOOPER,
March 23, 1750.
[*334]

BROWNSWORD *versus* EDWARDS,
March 20, 1750.

VOL. II.
Page 243.

(*Reg. Lib.* 1750. A. fol. 226, 227.)

NOTES AND OBSERVATIONS.

(1) SEE *Harrison v. Southcote*, 2 *Ves.* 389, and *Chetwynd v. Lindon*, *ibid.* 451. Vide also *ibid.* 493 ; 1 *Atk.* 539 ; 2 *Atk.* 393 ; 1 *Bro.* 77 ; 2 *Atk.* 200 ; 1 *Ves.* 246-7 ; 3 *P. W.* 376, &c.

(2) [Averments are necessary to exclude intendants, which would be made against the
2 A pleader ;

Plea allowed to discovery of a marriage which would subject one of the parties to punishment (1) in the
[335] Ecclesiastical Court ;

BROWNSWORD
versus
EDWARDS,
March 20, 1750.

[335]

Court; the other
being dead.
What averments
are proper to
support a plea.
(2)

Demurrer.—
Questions even
of title, con-
struction of
wills, &c.
determined on
Demurrer, if

quite clear on the face of the bill, that the determination must be on the same matters in the more protracted way at last. Question as to an equitable estate tail.

pleader; for the Court will always intend the matters charged against the pleader, unless fully denied. 2 *Atk.* 241; *Gilb.* 185.]

Upon the subject of pleas, the author has great satisfaction in referring the profession to Mr. *Beames's* recent and valuable work, entitled "Elements of Pleas in Equity." Upon the point of Averments, vide *ibid.* 23 to 28. Upon the doctrine applicable to the principal case, and others of a similar nature, vide *ibid.* 259, 260, and the various cases in note (3) there.

See further in *Bayley v. Adams*, 6 *Ves.* 586, &c.

VOL. II.

Page 249.

Ex parte WILLIAMSON, March 25, 1751.

S. C. 1 *Atk.* 82.

NOTES AND OBSERVATIONS.

Bankrupt.—
Certificate al-
lowed, notwith-
standing a sus-
picion in the
Court as to the
view in taking
out the com-
mission. (1)
Former practice
of traders in Ire-

(1) SEE *ex parte King*, 11 *Ves.* 417, and 13 *Ves.* 181. Agreeably to what is said by Lord *Hardwicke*, p. 250.

A mandamus will *not lie* to compel the allowance of a certificate. See 7 *East Rep. K. B.* 92.

[(2) The bankrupt laws have been adopted in Ireland by stat. 11 and 12 *Geo. III.*]

land coming over and contracting debts in England, where they procured commissions of bankruptcy to be taken out against themselves by collusion. (2)

RIGDEN *versus* VALLIER, March 25, 1751.

VOL. II.

(Reg. Lib. 1750. B. fol. 279.)

Page 252.

NOTES AND OBSERVATIONS.

(1) *No case was directed.* The Court declared, "that the Defendant *M. V.* was entitled to one moiety of the estate; and that the other moiety thereof ought to be divided between the Plaintiffs and Defendants in thirds; and that the said Defendant *M. V.* was also entitled to one-third of that moiety; that the Plaintiff *E. R.* was entitled to one other third thereof; and that the three other Plaintiffs, *W.*, *T.* and *G. R.* were entitled to the remaining third thereof." An account was directed of the rents and profits "accrued from the beginning of one year before the filing of the bill; the balance upon which was to be divided in the above-mentioned proportions; and a partition was directed." *R. L.*

It has been said that Lord *Thurlow*, C. in *Stratton v. Best*, 2 Bro. 233, 240, regretted the decision in the principal case. Vide 2 *Meriv.* 318. *Sed quære*, Why?

Words even of *survivorship*, in a will, shall not defeat the effect of the words importing a tenancy in common; but shall be referred to some time, as the death of a tenant for life, or even to the death of the testator; although this would be a construction not to be adopted if there could be any other. *Russell v. Long*, 4 *Ves.* 551. See also *Perry v. Woods*, 3 *Ves.* 204.

The note to p. 256, in the third edition of *Vesey*,

S.C. 3 Atk. 731.

A father by deed poll, reciting his intention of

[336]

settling and assuring all his real and personal estate on his family after his decease (inter alia), grants "in consideration of natural love and affection," lands to two of his children and their heirs, "to be equally divided between them," but does not make livery. This deed held to operate in nature of a testamentary instrument, and being made in consideration of natural love, &c. was held to amount to a covenant to stand seised. The children considered to take as tenants in common both by the words used, and also from the nature of the pro-

RIGDEN
versus
VALLIER,
March 25, 1761.

sey, sen. refers to *Cowp.* 657, where Lord *Mansfield* agreed with Lord *Hardwicke* in this case, and with the doctrine laid down by *Gould J.* in *Fisher v. Wigg.* 1 *P. W.* 14, against the opinion of Lord C. J. *Holt*, and cites *Cro. Eliz.* 695; 2 *Roll. Ab.* 39; 1 *Eq. Ca. Ab.* 292; *Pl.* 10; *Prec. Ch.* 164. 491; 1 *Bro.* 118; 1 *Ves.* 13; and 3 *Atk.* 524. Likewise 2 *Atk.* 122, and 1 *Durn.* and *East* 597.

provision. (1)
Where an estate, subject to a question of law, is of small value, and a Court of Equity does not think proper to decide it,] the Court will direct a case to be argued and heard before two judges at chambers, instead of being set down in the special paper of the Court at Law.

(1)

[337]
VOL. II.

Page 259.

OLDHAM versus HAND, April 24, 1751.

NOTES AND OBSERVATIONS.

Gift to an attorney after the cause was over, without proof of any thing improper, not set aside. It would have been otherwise, if before the cause, as in contemplation of it; or during its progress. (1)

(1) *Vide* in *Cray v. Manfield*, 1 *Ves.* 379, et *antea* 167. Also *Wood v. Downes*, 18 *Ves.* 120. 126. 127. and see *Hylton v. Hylton*, *postea* 547. *Hawk. P. C. c.* 545. *Proof v. Hines.* *Forr.* 111. *Walmsley v. Booth*, 2 *Atk.* 25. *Drapers' Company v. Davis*, 2 *Atk.* 295. *Neuman v. Payne*, 2 *Ves.* jun. 199. *Hatch v. Hatch*, 9 *Ves.* 292. *Wells v. Middleton*, there cited by Lord *Eldon*; C. 294, again 12 *Ves.* 372, and in 18 *Ves.* 127, which was a very strong case. *Strachan v. Brander*, cited also 18 *Ves.* 127, since rep. in *Eden's Rep. temp. Lord Northington*, 1 vol. p. 303. *Wood v. Downes*, 18 *Ves.* 120. *Montesquieu v. Sandys*, *ibid.* 302, and *Stevens v. Bagwell*, 15 *Ves.* 139. It is upon the acknowledged doctrine in all the above cases, that the Editor has ventured to doubt the propriety of Sir *John Strange's* decision of *Cray v. Manfield*, 1 *Ves.* 379, et *antea* 167.

HUBERT

HUBERT *versus* PARSONS, April 29, 1751.

VOL. I

NOTES AND OBSERVATIONS.

Page 261.

(1) SEE p. 263, 264, and *Batsford v. Kebbell*, 3 *Ves.* 363.

(2) See in Lord *Teynham v. Webb*, 2 *Ves.* 198, and 209; *et antea* (325).

(3) See pp. 262, 263; *et vide* 2 *Ves.* 207, and 2 *Cox P. W.* 612, note. *Vide* also *Bolger v. Mackell*, 5 *Ves.* 509.

Trust "to raise" 5000*l.* portion "and pay it" to such younger child as the father should appoint; for want of appointment to the younger children at 21, with interest for

their maintenance (1), &c. in the meantime, &c. &c. The *only* younger child died at two years old. Held *not* to be vested in him, so as to be claimed by the father as his representative. (2) Portions by wills governed by rules from the civil law, not applicable to a deed. (3).

BLANCHET *versus* FOSTER, April 29, 1751. Page 264.

(*Reg. Lib.* 1750. A. fol. 448.)

NOTES AND OBSERVATIONS.

THIS principle was recognized in *Lady Strathmore v. Bowes*, *et e contrà*, 1 *Ves.* jun. 28. But that case turned on particular circumstances of stratagem and fraud on the part of the husband. See 2 *Bro.* 345, S. C. and 1 *Ves.* jun. 22, &c.

(2) Mr. *Beames*, in his very useful work on Costs in the Courts of Equity, observes upon the singularity of the distinction made by Lord *Hardwicke* in the principal case, and respectfully questions if his Lordship said he would have excused the husband

Bond by a woman about to marry, without [338] her intended husband's knowledge, but for valuable consideration in respect of an antecedent debt. Held, the husband could not be relieved against it.

band

Con-

BLANCHET
versus
FOSTER,
April 29, 1751.

Concealment
however, of
such securities
and debts, not
to be en-
couraged. (1)

band from the costs of dismissing his bill out of his own pocket on the ground of the concealment practised upon him, but that he must pay the costs as the administrator of his wife, who would have been liable to them if she had been the survivor. See *Beames* on Costs, 101. 102, and note (10).

VOL. II.
Page 265.

CHANCEY versus FENHOULET,
April 29, 1751.

S.C. 2 Atk. 392.
and at the hear-
ing 2 Atk. 616.

Demurrer al-
lowed to a dis-
covery of the
fact of a mar-
riage, which,
if taken place
without con-
sent, would
cause a for-
feiture of an
estate; the bill
charging there was such marriage and no consent. (1)

NOTES AND OBSERVATIONS.

THE report of this cause at the Hearing, is in 2 Atk. 616.

(1) Upon the subject of forfeitures, penalties, &c. see Mr. *Beames's* Elements of Pleas in Equity, 259, 260, and the cases referred to by the note there. Vide etiam *Brownsword v. Edwards*, 2 Ves. 243, et antea 334.

Page 265. JACOMB versus HARWOOD, April 30, 1751.

(Reg. Lib. 1750. A. fol. 410.)

Rolls.

Interest on a
banker's note
from circum-
stances, though
no

NOTES AND OBSERVATIONS.

(1) Two separate mortgage assignments were made by *Sutton* to the Defendants, for securing their respective demands with interest. The De-
fendant

defendant *Harwood*, who was *Sutton's* co-executor, stated that he had refused to execute either of the deeds of assignment, since he did not think it right that *Gibson's* separate estate should be thus subjected to debts from the partnership, and because *Sutton* had altered the nature of the debts, and made them his own, by giving the judgments. He therefore submitted the validity of them to the Court, stating that *Sutton* and he were, under *Gibson's* will, devisees of the mortgaged estates (amongst others) upon the trusts therein mentioned; and he submitted also whether, since it did not appear that interest was originally agreed to be paid for these demands, *Sutton* could charge their testator's estate with interest, to the prejudice of his other creditors. *Sutton* became a bankrupt, after making the mortgages, and his assignee was before the Court. An account was directed as to what was due to the Plaintiffs, respectively, for principal, interest, and costs, on their respective mortgages; and a sale of the mortgaged premises was directed, *the Defendant Harwood consenting thereto*. The proceeds were ordered to be applied in satisfaction of the Plaintiff's several demands in the first instance, and then in payment of *Harwood's* costs. If any surplus, it was to be laid out in the name of the *Accountant General, &c.* *R. L.*

(2) The Court will not only let assets be followed in cases of fraud, or collusion (see p. 269), but of great negligence. *Hill v. Simpson*, 7 Ves. 152.

See some observations of Sir *William Grant*, *M. R.* upon the principal case, in *Devaynes v. Noble*, 1 Meriv. 565.

JACOMB
versus
HARWOOD,
April 30, 1751.
no evidence of
an agreement
for it.

[339]

Judgment in action against a surviving partner, no extinguishment of the partnership debt in equity. Each executor has entire control over a testator's personal estate; he may release, pay, or transfer without the others. And so as to each administrator; though formerly questioned.

One executor may retain in satisfaction of his own debt, if no fraud. (1) A surviving partner, therefore, being an executor of the deceased partner, and having mortgaged leasehold property of the latter for better security of a debt due from the testator to himself, the mortgagees were entitled

to satisfaction, and creditors of the testator, under marriage articles, who had no specific lien, were not allowed to pursue the premises thus assigned. (2)

A mortgagee coming into Equity, or being before the Court, not sent to avail himself of his securities at law, since the matter must finally come round to the same end, on a bill to redeem.

[340]
VOL. II.

Page 269.

REVEL *versus* FOX, May 1, 1751.

(Reg. Lib. 1750. B. fol. 349.)

The fact of a marriage charged by the bill, and denied by the parties' answers (there being evidence in the cause), must be tried at law; such matters being the proper subject for a jury.

Page 270. COWSLADE *versus* CORNISH, May 2, 1751.

NOTES AND OBSERVATIONS.

A party to a cause may be examined on new interrogatories in the Master's office without a new order, the Master being the proper judge. In the case of a witness it is different; for under a commission to examine, there must be a new order for new interrogatories. (1)

(1) [But the Court and the Bar agreed in *Andrews v. Brown*, Prec. Ch. 386. that in the Examiner's office either party might, without application to the Court, exhibit interrogatories for further examination of the same witness, &c.; though no new interrogatories could be exhibited under a commission without an order for the purpose. *Gilb. Rep.* 41; 1 *Eq. Ab.* 233; *Hinde's Ch. Pract.* 317. In *Rowley v. Ridley*, 2 Bro. 15, interrogatories to falsify an examination, were ordered of course without notice.] Note to the third edition.

See further *Sawyer v. Bowyer*, 1 Bro. 388, with the cases referred to by the note to Mr. *Bell's* edition, and *Smith v. Graham*, 2 *Swanst.* 264.

E. of GODOLPHIN *versus* PENNECK,
May 3, 1751.

(Reg. Lib. 1750. A. fol. 404.)

[341]
VOL. II.
Page 271.

NOTES AND OBSERVATIONS.

VIDE *Leigh v. E. of Warrington*, 1 Bro. P. C. 511, octavo edition; and 4 vol. 90, folio. The Author of these notes is in possession of a MS. report of this case on the first appeal before Lord C. King, in which the statement of that part of the will, held to amount to a charge, rather differs from the Report of it in Bro. P. C. In the latter, after the preamble, "As to my worldly estate," &c. the direction of the will is merely that the debts "be discharged and paid;" whereas the MS. Rep. proceeds thus:—"out of my worldly estate." In support of the charge were cited 2 Vern. 708; 1 Vern. 411; *ibid.* 45; 2 Vern. 228 and 690; and *Harris v. Ingledew* [3 P. W. 91]. The hearing of this first appeal was on the 17th of May 1732. The Lord C.'s judgement on this point is thus reported in the Author's MSS.

"I think the personal assets must first be applied as far as they will go; but to see how far the real estate is chargeable, we must consider the words of the will. He wills, 'that his debts be paid out of his worldly estate;' and the words 'worldly estate' take in the real as well as personal estate. Now, though there be a devise of several parts of the real estate, chargeable with the annuity, yet that does not defeat the charge which was laid on it by the words *worldly estate*, which

Under a devise that all testator's debts "should be first paid and satisfied," Held that a customary estate surrendered in trust for several persons, and for the use of such as the testator should appoint, was subject to the testator's debts; the first disposition running over all.

[342]

"take

E. of
GODOLPHIN
versus
PENNECK,
May 3, 1751.

"take in every thing, as well real as personal. The
"personal assets must first be applied as far as
"they will go; then in case of a deficiency to
"come upon the real." MSS.

Lord *Loughborough*, C. in *Williams v. Chitty*,
thought *Leigh v. Lord Warrington*, a strong case;
and seems to have been of the same opinion as to
the principal case above. See 3 *Ves.* 551, 552.

Sir *William Grant*, M. R. was of opinion in
Powell v. Robins, 7 *Ves.* 209, that the mere direc-
tion that all debts "should be paid," or "should
be paid by executors," will not of itself amount to
a charge. See 7 *Ves.* 211. His Honour is sup-
ported in this by *Bridges v. Landen*, and *Keeling*
v. Brown, relied on by him in 7 *Ves.* 211. There
must, however, be some mistake in classing *Wil-*
liams v. Chitty with these cases, since the decision
amounts to the very reverse. See 3 *Ves.* 552. It
is indeed impossible to reconcile all the decisions
on these points; though it may, in general, be
observed, that the older cases seem more favour-
able to charging the real estate than the later.
The Court, however, seems always to have agreed
in favour of the charge where the executor was
also a devisee. *Clowdesley v. Pelham*, 1 *Vern.* 411;
Elliott v. Hancock, 2 *Vern.* 143; *Stanger v. Tryan*,
and *Hay v. Townshend*; Mr. *Raithby's* note to 2
Vern. 709; *Keeling v. Brown*, 5 *Ves.* 361; *Finch*
v. Hattersley, stated 7 *Ves.* 210, 211.

[343]

As to the distinction made by some Judges be-
tween construing a charge in favour of debts, and
not of legacies, see *Davis v. Gardiner*, 2 *P. IV.*
187, 190; *Kightley v. Kightley*, 2 *Ves.* jun. 328;
3 *Ves.*

3 *Ves.* jun. 551; *Keeling v. Brown*, 5 *Ves.* 359, 362.
Et vide *Alcock v. Sparhawk*, 2 *Vern.* 228, 229.

Ex parte MATTHEWS, May 3, 1751.

VOL. II.

NOTES AND OBSERVATIONS.

Page 272.

Brown v. Heathcote, there cited, is in 1 *Atk.* 160; *Ryal v. Rowles*, *ibid.* is in 1 *Ves.* 348 (quod vide); and 1 *Atk.* 165. See there the notes to Mr. Sanders's edition.

Mortgage of a ship at sea good in bankruptcy, notwithstanding the stat. of Jac. I. if the party procures the bill of sale, &c. Contra, if he is incautious or another voyage.

(1) See *Bourne v. Dodson*, 1 *Atk.* 154; et vide *Rolleston v. Hibbert*, 3 *T. R.* 406; and *Mestaer v. Gillespie*, 11 *Ves.* 621, with the cases referred to.

negligent; as by suffering the ship to come back, and go on
(1)

ATTORNEY GENERAL *versus* COOK,
May 4, 1751.

(*Reg. Lib.* 1750. *A. fol.* 370.)

NOTES AND OBSERVATIONS.

Page 273.

After a bequest before the Mortmain Act, of 50*l.* charged on land to P. J. the minister of a Baptist meeting-house, certain other premises (1) were devised away, charged with an annuity of 10*l.* [344] "to the minister belonging to that meeting-house." This held a valid (2) charitable bequest for the ministers in succession, and not personal to P. J.

(1) THE 50*l.* and the annuity of 10*l.* were charged on distinct premises. *R. L.*

The case of *Lloyd v. Spillet*, cited p. 273, from 3 *P. W.* was affirmed on a re-hearing by Lord Hardwicke, C. See 2 *Atk.* 148, and *Barn. Rep.* Ch. 384.

De Costa v. De Pays, cited p. 274, is in *Ambl.* 228; as to which see Lord Hardwicke's reasoning, stated from his notes, 7 *Ves.* 76, 77. See also *Isaac v. Gompertz*, stated 7 *Ves.* 61.

(2) As to what is said, p. 276, see *Corbyn v. French*, 4 *Ves.* 418.

PINNEL

VOL. II.

PINNEL *versus* HALLET, May 11, 1751.

Page 276.

(Reg. Lib. 1750. B. fol. 590.)

NOTES AND OBSERVATIONS.

The purchase of
houses in London
(1) and of lands
of the tenure of
Borough Eng-
lish, (2) held not
to be a due exe-
cution of a co-
venant in mar-
riage articles to
purchase or
settle "lands of inheritance." As to the mode of computing the value of pre-
mises in the Master's office. (3)

(1) S. P. *Lewis v. Hill*, *antea* 140, and 1 *Vesey* 275.

(2) A like declaration was made by the Court on this point, which is not at all noticed in the Report. The covenant was general to settle "lands of inheritance." *R. L. ubi supra*, et fol. 593.

(3) See page 277 of the report.

[345]

BOON *versus* CORNFORTH, May 13, 1751.

Page 277.

(Reg. Lib. 1750. A. fol. 399.)

NOTES AND OBSERVATIONS.

Will, construc-
tion of. —
Repugnant
words in a will
may be rejected
or transposed.
In this case the

(1) SEE *Trafford v. Trafford*, 3 *Atk.* 347; *Chapman v. Hurt*, 1 *Ves.* 271, 273, et *antea* (138); and *Stuart v. M. of Bute*, on re-hearing, 11 *Ves.* 657, with the cases referred to.

Court rejected a repugnancy by interlineation. Bequest of the use and enjoyment "of every thing else at my house," means such things as are proper to go with the house as *heir-looms*, viz. fixtures and ornaments, not watches, &c. &c. (1) Estate for life in lands, by implication, rebutted by the party having a bequest for life in a particular part of them, and by testator desiring she should not be turned out.

TAYLOUR

TAYLOUR *versus* ROCHFORD, May 18, 1751.

VOL. II.

NOTES AND OBSERVATIONS.

Page 281.

(1) EVERY instrument whereby a seaman or mariner conveys his prize money or wages, in the hands of the public officers, must now be in the form prescribed by Stat. 26 Geo. III, c. 63, and the other Statutes referred to, 6 *T. R.* 426.

Sale of a seaman's prize money (1), and subsequent agreement in confirmation, (2) set aside.

(2) As to the doctrine on confirmation, see in *Morse v. Royal*, 12 *Ves.* 355, *passim*.

Baldwin v. Rochford, cited p. 282, is in 1 *Wils.* 229. *Stapilton v. Stapilton*, cited p. 283, is in 1 *Atk.* 2. *Lord Chesterfield v. Janssen*, cited *ibid.* is in 2 *Ves.* 125, *et antea* (297); and 1 *Atk.* 301. *Coton v. Luttrell*, mentioned p. 285, is stated in the same vol. 220, 223.

JACKSON *versus* KELLY, *Trin. T.* 1751.

[346]

(*Reg. Lib.* 1750. *A. fol.* 589.)

Page 285.

NOTES AND OBSERVATIONS.

(1) "IN the case of lapse of *real* estate the *heir* takes; *but* in the case of *personal* property, the "*residuary legatee* is preferred, either to the next "of kin or the executor." Per Lord *Eldon*, C. 8 *Ves.* 25. See also in *Oke v. Heath*, and *Durour v. Motteux*, 1 *Ves.* 141 and 322, *et antea* (82) and (157); and *D. of Marlborough v. Lord Godolphin*, 2 *Ves.* 61, *et antea* (277).

Testator intending to dispose of all his personal estate gives the residue in fifth shares; *but* appoints his brother "*heir to whatever part of his estate should be unappropriated*"

The

JACKSON
versus
KELLY,
Trin. T. 1751.

propriated by his
will." One of
the five shares
lapsed in testa-
tor's life-time
Held that the
above was an ul-
timate general
residuary clause;
and comprized this,
as including not merely
what was not mentioned,
but every thing not
effectually given(1).

The residuary legatee *must*, however, *be a general, and not a particular one*; for if the will only give a legatee what remains *after* payment of legacies, he will not be entitled to any benefit from lapse. See the cases in 2 *Roper on Legacies*, 490, &c.

As to the point mentioned by Lord *Hardwicke*, at the bottom of page 285, see *Peat v. Chapman*, 1 *Ves.* 542, *et antea* (241); and *Bagwell v. Dry*, 1 *P. W.* 700; with the cases in the note.

VOL. II.

Page 286.

In the
Exchequer.

Waste.—

[347]

Alien.—

The legal disability of an alien to hold lands, neither a penalty, nor forfeiture.

ATTORNEY GENERAL *versus* DUPLESSIS.

NOTES AND OBSERVATIONS.

SEE *S. C.* also in 2 *Ves.* 360, 538, 555, and 1 *Bro. P. C.* 415, octavo edition.

As to the demurrer mentioned at the bottom of p. 287, as overruled, with the judgement affirmed in *Dom. Proc.* the Judges in the House of Lords certified their opinion, "that the legal disability of an alien to hold lands was neither a penalty nor forfeiture." 1 *Bro. P. C. ubi suprâ*.

Litton v. Robinson, and *Fleming v. Fleming*, mentioned p. 287, are cited in *Garth v. Cotton*, 1 *Ves.* 526; as to which vide the note, *antea* (233).

E. of DERBY *versus* D. of ATHOL,
June 6, 1751.

VOL. II.
Page 298.

(Reg. Lib. 1750. A. fol. 452.)

(1) SEE *Robinson v. Lord Rokeby*, 8 *Ves.* 601, Privilege of
and *Lord Milsington v. Earl of Portmore*, 1 *Ves.* peerage. (1)
and *Beames* 419.

LEGAL *versus* MILLER, June 10, 1751.

Page 299.

(Reg. Lib. 1750. B. fol. 523.)

NOTES AND OBSERVATIONS.

(1) SEE also *Mortimer v. Orchard*, 2 *Ves.* jun.
243.

A Defendant, however, in such a case, may have a Decree on the agreement, *such as he has proved it to be*. *Fife v. Clayton*, 13 *Ves.* 546; and *Gwynn, v. Lethbridge*, 14 *Ves.* 585. Though in general a Plaintiff can only obtain a Decree by the express confirmation of the case he states in evidence, or by admission; the case of a suit for tithes is peculiar. Though a Plaintiff may fail in establishing his right to tithes in kind, as alleged by his bill, he may yet take advantage of a modus set up by a Defendant, and have a Decree on that footing. Vide *Carte v. Ball*, 1 *Ves.* 3; *et antea* 4.

(2) Vide *Woolam v. Hearn*, 7 *Ves.* 211; and the cases there cited.

Bill for specific performance of a written agreement, and parol evidence read of a variation from it; which being proved, the bill dismissed with costs; the Plaintiff not being allowed to resort to the substantial agreement thus proved on the part of the Defendant (1). Parol evidence admitted to resist a claim, or rebut an equity, though inadmissible to establish a demand: (2)

VOL. II.

Page 300.

FAWCET *versus* LOWTHER, June 15, 1751.

(Reg. Lib. 1750. A. fol. 476.)

NOTES AND OBSERVATIONS.

Copyholds.—
Particular cus-
toms of a manor
as to mortgages.
Equity of re-
demption will
follow the cus-
tom attaching
on the legal
estate.

Not absolutely
determined (1)
whether trust
estates or equi-
ties of redemp-
tion in copy-
holds, *escheat* to
the lord.

Casborne v. Inglis, cited p. 301, is in 1 *Atk.* 603. *Burgess v. Wheat*, cited *ibid.* though not then determined (as stated at the top of the next page, was afterwards decided in 1759. See the whole case, 1 *Blac. Rep.* 123, and more particularly 1 *Eden. Ch. Ca.* 177. Vide also *Barclay v. Russell*, 3 *Ves.* 424, and *Williams v. Lord Lonsdale*, *ibid.* 752.

(1) There was a difference of opinion between the Judges in *Burgess v. Wheat*, 1 *Blac. Rep.* 123, &c. both upon the points in question and several that were incidental; and the decision itself seems disapproved. See per Lord *Thurlow* in *Middleton v. Spicer*, 1 *Bro.* 204, 205. Et vide *Walker v. Denne*, 2 *Ves. jun.* 170, 277, &c.

Though it was determined in *Williams v. Lord Lonsdale*, 3 *Ves.* 752, that the Plaintiff, the heir of a trustee, had no equity to compel the Lord to admit him, even where the premises had been duly surrendered upon the death of the *cestui qui* trust, without heirs, Mr. *Scriven*, in his late perspicuous and very useful work on Copyholds, observes, with much weight and acuteness, that in such a case a Court of Law would compel the Lord to admit such an heir, agreeably to *The King v. Coggan*, 6 *East.* 431; and that *when so admitted*, “ we have yet

"yet to see *what equity the Lord would have, paramount such heir.*" *Scriven on Copyholds*, 293, 294.

FAWCET
versus
LOWTHER,
June 15, 1751.

Mr. *Scriven* makes another observation (pp. 284 and 293, notes), which is worth consideration. Mr. *Scriven* conceives, that where a person who had purchased a copyhold estate in the name of a trustee, dies intestate and without heirs, a Court of Equity would consider the purchase money as a lien upon the estate, and decree the same to be sold for the benefit of *his next of kin*. The Author of these notes, individually, cannot assent to this opinion, because the money having been *invested in an actual purchase of land*, must have lost its pecuniary nature, which *alone* could create any equity whatever in favour of such next of kin. He submits the point as he finds it; and still the great question remains, as to whether there ought to be any escheat at all of trust estates, subject to the cases and observations above referred to.

Mr. *Scriven* has published a new edition of his work in two volumes, since the first appearance of the present work. The point in question will be found there, 1 vol. 462 *et seq.*

RAMSDEN *versus* HYLTON, and HYLTON
versus BISCOE, *et è contrà*, June 17, 1751.

(Reg. Lib. 1750. A. fol. 651.)

[350]
VOL. II.
Page 304.

NOTES AND OBSERVATIONS.

(1) *VIDE Bingham v. Bingham, antea 79.*

(2) See also 1 *Ves.* 507.

2 B

General release
from a sister to
a brother not
bind-

(3)

RAMSDEN
versus
HYLTON,
and HYLTON
versus
BISCOE,
et e contra,
June 17, 1751.

binding as to particular rights under the marriage settlement, or articles of the parents, the sister being ignorant of them, (1) and the brother having covenanted that he was seised in fee, contrary to the fact.
Satisfaction.—The sister held entitled to her claims under the settlement or articles, and also to the consideration recited and expressed in the deed of release;

[351]

the brother being a debtor to her to such amount on the face of it.

(3) Vide *Ward v. Shallet*, 2 *Ves.* 18, at *antea* 254.

Notwithstanding the cases cited in the argument, p. 307, as to the Court's refusing to compel a specific performance of agreements, where the party could not obtain what was his *specific* object in the contract, the Courts of Equity have gone much further *the other way* since the periods referred to; and have compelled parties to perform contracts diametrically opposite to their manifest intention. See per Lord *Eldon*, C. 6 *Ves.* 678, &c. &c.

Goring v. Nash, cited p. 309-10, is in 3 *Atk.* 186.

The Decree is entered as of the 9th of the following month, from whence it appears that a sale was directed upon the mortgagees' consent. The Court ordered all deeds, &c. to be produced upon oath before the Master, except such as were in their possession, &c. giving the parties liberty to apply to the Court for a production of the latter, for the satisfaction of a purchaser, in order to make out the title, as occasion should require; and directed, that "in case there should be any extraordinary delay in the sale, any of the mortgagees should be at liberty to apply to the Court for leave to take such remedy on their mortgages respectively, either by ejectment or bill of foreclosure, as they should be advised."

Reg. Lib. ubi supra, and fol. 657.

A general release with a particular consideration recited, will be construed according to the particular recital (2). Settlement after marriage, if a portion paid, is one good consideration, and equal to one made before marriage (3).

Order made on mortgagees consent to a sale in case of there being delay.

LBIGH *versus* THOMAS, June 19, 1751.

VOL. II.

Page 312.

NOTES AND OBSERVATIONS.

(1) A bill may be brought by some *on behalf of themselves and the rest of a crew*, for an account of captures, &c. *Good v. Blewit*, 13 *Ves.* 397. In that case the bill was not so framed at the first, and leave was given *at the hearing* to introduce a statement to that effect. *Moffat v. Farquharson*, 2 *Bro.* 338, is therefore clearly wrong as to this point. So as to other adventures, *Prec. Ch.* 592; *Adair v. New River Company*, 11 *Ves.* 429, and the cases referred to. Et vide *Lloyd v. Loaring*, 6 *Ves.* 773 to 779. Vide also *Anon. Prec. Ch.* 592. *Cullen v. D. of Queensbury*, 1 *Bro.* 101. 4th edit. *Good v. Blewit*, 13 *Ves.* 397. *Brown v. Harris*, *ibid.* 552. *Cockburn v. Thompson*, 16 *Ves.* 321. 328. 329 and *Buckley v. Cater*, stated also 17 *Ves.* 11. 15. 16.

Demurrer.
Want of parties.
Part of a ship's crew appointed two to be agents. On a bill for an account by such agents in their own names, and not "on behalf of themselves and the rest," a demurrer was allowed for not having made the whole crew parties (1).

In respect of the stress laid by the Master of the Rolls in the principal case (p. 313), upon the familiar instances of creditors and legatees, it is very observable, that Lord Eldon, C. states there are strong passages in Lord Hardwicke's notes, indicating that the right of a few to represent all the rest, is *by no means* confined to such instances. Vide 6 *Ves.* 779. Et vide *Boddy v. Kent*, 1 *Meriv.* 361.

[352]
VOL. II.
Page 313.

THOMAS *versus* BRITNELL, June 20, 1751.

(Reg. Lib. 1750. B. fol. 635.)

NOTES AND OBSERVATIONS.

Wills construed to charge real estate by implication for the benefit of creditors. (1) Such implication, however, may be afterwards destroyed.

THE words used by the testator were "honourably paid *immediately* after his decease." *R. L.*

(1) Vide in *E. Godolphin v. Penneck*, 2 *Ves.* 271, 272, *et antea* (341).

Lord *Warrington's* case, cited p. 314, is in 1 *Bro. P. C.* 511, octavo edition, and 4 vol. 90 of the folio edition.

See further as to this case in the note on *E. Godolphin v. Penneck*, *antea* (341).



Page 315. CHICOT *versus* LEQUESNE, June 21, 1751.

(Reg. Lib. 1751. B. fol. 90.)

NOTES AND OBSERVATIONS.

Award made by two arbitrators out of three, through the unjust exclusion of the third by one of the others, set aside with costs, to be paid by that person, and the material parties in favour of whom it was made.

" It appearing that one of the three arbitrators
" was, after one of the meetings, refused and ex-
" cluded by the Defendant *G.* from meeting with
" him and the other arbitrator, and considering
" jointly with them of the evidence and merits
" of the case, though he desired so to do, the
" Court declared, that the award made ought to
" be set aside," &c. ; and the material Defendants,
as to the demand in question, to pay the costs of
the suit.

Courts

* Courts of Equity will not interfere in awards where the objections to them might have been equally the subject of jurisdiction in a Court of Law. *Fetherstone v. Cooper*, 9 *Ves.* 67. It is no objection, that a reference to arbitration was not made a rule of Court till after the award. *Ibid.*

It seems, an award will be binding though the arbitrator mistakes the law. *Steff v. Andrews*, 2 *Madd. Rep.* 6.

CHICOT
versus
LEQUESNE,
June 21, 1751.
[*353]

EXEL versus WALLACE, June 22, 1751.

(*Reg. Lib.* 1750. *A. fol.* 492.)

VOL. II.
Page 318.

NOTES AND OBSERVATIONS.

(1) SEE the marginal note on this point, the observations, and other notes, annexed to the former stage of this cause, *antea* (295).

Theebridge v. Kilburn, cited p. 319, is in 2 *Ves.* 233, *et antea* (331). *Lomax v. Holmden*, cited p. 321, is in 1 *Ves.* 290; *et antea* (152). *Lord Teynham v. Webb*, cited *ibid.* is in 2 *Ves.* 198, *et antea* (325).

See this case
2 *Ves.* 117, *et*
antea (295).
Appeal from the
Rolls on the se-
cond point (1).

GASON versus WORDSWORTH, July 3, 1751.

(*See Reg. Lib.* 1750. *A. fol.* 641.)

Page 325.

See S. C. 2 *Ves.*
336, *et postea*
357.

NOTES AND OBSERVATIONS.

SEE 2 *Ves.* 336, *et postea* (357), where the Lord C. made the order as prayed, upon the commission having been returned unexecuted, and no possible likelihood of an execution of it afterwards.

Where it is quite
clear that an ex-
amination in
chief is morally
impossible, there
may be a publi-
cation of deposi-
tions taken *de*
bene esse.

FLOWER

[354]
VOL II.

Page 326.

Injunction until hearing, to restrain an action by a bankrupt against the assignees under his commission, upon the ground of his long acquiescence under the commission. (1)

FLOWER *versus* HERBERT, July 4, 1751.

(Reg. Lib. 1750. A. fol. 518.)

(1) It seems, however, that the application should have been for an order under a *petition in the bankruptcy*, and not by bill in equity, and that such a bill is not sustainable. *Kirkpatrick v. Dennett*, 1 *Glyn and Jameson*, 300. See the circumstances of the principal case from *Reg. Lib. ibid.* note.

Page 327.

ATTORNEY GENERAL *versus* MIDDLETON,
July 4, 1751.

(Reg. Lib. 1750. A. fol. 484.)

NOTES AND OBSERVATIONS.

A free school founded by charter, with proper powers, must be regulated in the first instance by the charter, not by application to a Court of Equity. (1) No formal words necessary for the appointment of a visitor (2), but the visitatorial power not to be extended. (3)

(1) SEE *Attorney General v. The Foundling Hospital*, 2 *Ves. jun.* 42, and 4 *Bro.* 165; *Attorney General v. Smart*; and *Attorney General v. Talbot*, 1 *Ves.* 72, 78, *et antea* (53) and (57); and *Attorney General v. E. of Clarendon*, 17 *Ves.* 491.

(2) See 1 *Ves.* 78; 15 *Ves.* 315; and 17 *Ves.* 491, &c.

(3) See 1 *Ves.* 475.

(4) See *Attorney General v. Parker*, and *Attorney General v. Smart*, 1 *Ves.* 48, 72, and *ibid.* 418, *et antea* (37) and (53.)

The rule that an information for a charity is not to be dismissed, if the party has failed to pray the proper relief, holds only in those cases which the Court thinks proper for its interference at all, (4) and the information here being improper, was dismissed with costs.

BLUNT

BLUNT *versus* CUMYNS, July 8, 1751.

(Reg. Lib. 1750. A. fol. 641.)

[355]

VOL. II.

Page 331.

Thirty shares in a privateer remaining unsubscribed for, and taken by the managers of the concern on their own account, after a valuable capture, held to be the exclusive property of the managers. Bill on behalf of the other subscribers dismissed; since if there had been a loss, they could only have been answerable to the amount of their own shares.

Not dismissed *with costs*, as this act of the managers might give occasion to litigate the matter.

In all mercantile contracts and adventures, parol evidence of usage in such cases allowed.

Parol evidence, in the above cases, as to usage and custom on the written articles taken on behalf of the Plaintiffs, but not being read by them at the hearing, allowed to be called for and used by the Defendants.

WORSLEY *versus* E. of GRANVILLE,
July 9, 1751.

Page 331.

(Reg. Lib. 1750. A. fol. 600, entered "*Worsley v. Worsley.*")

NOTES AND OBSERVATIONS.

SEE p. 331, line 3 from the bottom. The trust was, "if there should be one, and no more, &c.; "*if two or more, then, 12,000*l.**" &c. R. L.

See same page, last line. After the words "twenty-one," the declaration ran thus: "or if such person, &c. to whom the real estate of inheritance expectant, &c. appertained, should pay to the daughter or daughters, &c. the said respective portions, or so much as should not before that

Portions.— Marriage settlement of husband and wife for life, and trust term if no issue male, or if all should die without issue male before 21 years, to raise portions for daughters, &c.

A

WORSLEY
versus
E. of
GRANVILLE,
July 9, 1751.
[*356]

A son attained 21, but died in father's lifetime without issue male. The portions not raiseable. Where a term for securing portions has been *misplaced* in a settlement, &c. s. as to be defeasible at Law, it will be rectified in Equity.

" *that time be raised out of the premises, &c. &c.
" *then* the term should determine," &c. *R. L.*

The case alluded to p. 333-4, seems to be *Uvedale v. Halfpenny*, 2 *P. W.* 151. See also the cases in Mr. *Cox's* note. *Hylton v. Biscoe*, mentioned p. 335, is in 2 *Ves.* 304, *et antea* (350).

The Court has often leant against raising portions out of a reversionary term. See Lord *Clin-ton v. Seymour*, 4 *Ves.* 440, 460; with Mr. *Cox's* note to *Butler v. Duncomb*, 1 *P. W.* 452, and the note to 2 *Ves.* jun. 481. Sed vide 6 *Ves.* 379, 380, where Lord *Eldon*, C. disapproves of the Court's "being eager to lay hold of *circumstances*" (4 *Ves.* 460), or "of *small grounds*" in such cases (1 *Atk.* 549), since it ought to be wholly impartial.

VOL. II.
Page 336.

AYLET versus EASY, July 11, 1751.

(*Reg. Lib.* 1750. *B. fol.* 482.)

NOTES AND OBSERVATIONS.

After an original bill proceeded in, it is *not a motion of course* to enlarge publication on a cross bill; but notice must be given, &c. (1)

(1) SEE 1 *Atk.* 21 and 291, where the application is regular.

The matter, in the principal case, came on upon two motions; the first by the Plaintiffs in the original cause to discharge an order obtained as of course by the Defendants, the Plaintiffs in the cross cause; whereby publication in the original cause was ordered to be enlarged, until a fortnight after the Plaintiffs in the original cause should have fully answered the cross bill: the other was on the part of the Defendants in the original

[357]

cause, *upon notice* that publication in that cause might be enlarged, until the first Seal after the next Michaelmas Term; and that the original cause might be adjourned over to the next Term. The Court discharged the former order, and acceded to the latter application. Vide 16 *Ves.* 93 and 133

AYLET
versus
EASY,
July 11, 1751.

GASON *versus* WORDSWORTH, July 11, 1751.

(Reg. Lib. 1750. B. fol. 641.)

VOL. II.
Page 336.

NOTES AND OBSERVATIONS.

Vide S.C. 2 *Ves.* 325, et antea 353.

VIDE S. C. 2 *Ves.* 325, et antea (353).

It appears from *R. L.* that the Government in Sweden had persisted in its refusal, though application had been made to the King and Senate; and that the commission had been returned since that time; so "that there was no probability of executing any future commission."

A foreign government having repeatedly refused to permit the execution of a commission to examine witnesses in its states,

agreeable to the indispensable rules of the Courts of Equity in England; publication was ordered of *depositions*, which had been taken *de bene esse*.

BISHOP of SODOR AND MAN *versus* EARL of Page 337.

DERBY, and EARL of DERBY *versus*

DUKE of ATHOL.

(Reg. Lib. 1750. A. fol. 581.)

NOTES AND OBSERVATIONS.

(1) SEE the plea filed in the second-mentioned cause, and the Lord Chancellor's observations on some

The statutes of wills et de donis conditionalibus,

BISHOP of
SODOR & MAN,
versus
E. of DERBY,
and
E. of DERBY
versus
D. of ATHOL.
[*358]

bus, do not extend to the Isle of Man. (1) That island made unalienable by a private Act of Parliament against heirs general, on failure of issue male.

*some points relative to the Isle of Man. 1 Ves. 202, 204.

On the present occasion, there were not only directions for the account, mentioned towards the bottom of page 357, but the Master was to compute the clear annual value of the Rectory, Tithes, &c. for the time to come, from the time to which “ the above-mentioned account was to be carried “ down [making proper deductions for the re- “ served rents]; and the value so computed was “ to be paid by the Earl of *Derby*, and any other “ persons claiming the premises comprised in the “ Deed of Collateral Security to the Plaintiffs, “ the Bishops, &c. and to their successors, &c. “ yearly, and every year, or at the end of six “ months after the determination of every year; “ to be respectively disposed of, distributed, and “ paid by them, from time to time, according to “ the trusts mentioned and declared in and by the “ said grant or demise, &c. And in case default “ should be made by the Earl of *Derby*, or any “ person who should claim under him, as afore- “ said, in making any of such annual payments, “ the Plaintiffs in the original cause were to be at “ liberty to apply to the Court, from time to time, “ for further directions to enforce the payment “ thereof, as occasion should require.” *Reg. Lib.* fol. 584.

KNIGHT versus DUPLESSIS, July 20, 1751.

(Reg. Lib. 1750. A. fol. 514.)

NOTES AND OBSERVATIONS.

(1) **SEN**, however, 3 *Atk.* 17.

A receiver appointed against a legal estate, under a conveyance, upon a strong ground of suspicion as to abused confidence. *Huguenin v. Basely*, 13 *Ves.* 105. Vide also in *Lloyd v. Pas-ingham*, 16 *Ves.* 59.

(2) See page 362 of the Report.

trustee for an infant, who had a contingent estate, cannot cut timber of his own authority, though it may be fit for cutting, or even for a probable benefit. Though such an act may not amount to waste, he will still be enjoined.

It seems that although an alien cannot hold lands for his own benefit, he may take an estate by devise, as well as by grant, conveyance, &c. (2)

[359]
VOL. II.

Page 360.

S.C. 2 *Ves.* 286.
538, 555, and
1 Bro. P.C. 415.
octavo edition.

Receiver not appointed on behalf of heir at law, as against a devisee.

The heir must try the question at Law. (1)
Guardian or

BARWELL versus PARKER, July 22, 1751.

(Reg. Lib. 1750. A. fol. 601.)

NOTES AND OBSERVATIONS.

[In 1 *Brown* 41, money raised by deed on land and vested in trustees, to pay debts, was held not to change the nature of simple-contract debts, and therefore they were not to bear interest. But if creditors had filed bills, and obtained separate reports, from that time they would have carried interest. Note to the third edition.]

See the Report.

(1) An executor who had been directed by the will not to derive advantage from money in his hands

Interest—

Under a trust term, by deed, to pay debts and legacies, held, that simple-contract debts did not carry interest. So likewise as to a will.

Contra, however, if by any deed in the nature of a speciality,

BARWELL
versus
PARKER,
July 22, 1751.
[*360]

ciality, from
whence an in-
tention can be
inferred, as if
the debts be an-
nexed by way of
schedule.
Scrivener, &c.
receiving mo-
ney, and giving
a note to place
it out at inte-
rest, is bound to
do so, and is not
discharged from
paying interest
for it, unless his
employer accepts the security and interest. Balance of an account stated by
such scrivener, &c. will carry interest. (1)

*hands without accounting for legal interest, to
accumulate for the cestuis qui trusts, ordered to
account for interest at 5 per cent. *with compound*
interest on half yearly rests. *Raphael v. Boehm*,
11 *Ves.* 92. *Affirmed on the re-hearing*, 13 *Ves.*
407, 590.

As to various other questions of interest, see
Creuze v. Hunter, 2 *Ves.* jun. 157, &c.; *D. Bed-*
ford v. Coke, 2 *Ves.* 117, *et antea* (293); *Bick-*
ham v. Cross, 2 *Ves.* 471, *post.* 388; and *E. of*
Bath v. E. of Bedford, *ibid.*, 587, *et postea.*

As to the case of *Car v. Countess of Burling-*
ton, particularly mentioned p. 364, the Decree in
Reg. Lib. is contrary to the declaration stated in
P. W.'s Report of it. See Mr. Cox's note, 1
P. W. 229.

VOL. II.

JONES versus CLOUGH, July 22, 1751.

Page 365.

(Reg. Lib. 1750. A. fol. 624.)

NOTES AND OBSERVATIONS.

Query the accu-
racy of the Re-
port in this case.

(1)
The marginal
note there is as
follows:

" Father tenant
" for life, and
" two sons, ar-
" ticle to
" charge [an
" estate]

(1) THE Author of these notes ventures to
doubt the propriety of the decision in a case thus
circumstanced, *considering the strength of the*
words "duly executed," which he cannot avoid
thinking a Court must construe with referen ce o
the Statute of Frauds. See also *D. of Marl-*
borough v. E. Godolphin, 1 *Ves.* 73, 76, 77. *et*
antea 279: likewise *Rose v. Conynghame* 12 *Ves.*
29. If it should be urged, that the Court would
supply

supply a defect in the execution of the powers in favour of such objects as younger children, he would submit, that it is putting the case upon a totally different ground than is argued upon by the Master of the Rolls in the Report; and that such a position is *in fact inconsistent with it*, inasmuch as His Honour considered the will had *no defect to be supplied*. However this may be, it is very singular that the point here reported, *is so far from being raised by the pleadings* (as they appear from the Registrar's book, that the Defendant Thomas even admits the will, according to the statement in the Bill, of its "*being duly executed*;" and expressly admits that the premises are chargeable with the 300*l.* under the articles.

The Bill was brought by a mortgagee, claiming under a security executed by *John*, after having suffered a recovery of part of the estates under a conveyance to him (the Plaintiff) of the shares of the younger children (excepting the share of *Thomas*) against *Thomas*, and *Richard*, one of the younger children, who merely claimed to be entitled, *under the will of John*, to the equity of redemption of such part of the estates whereof *John* had suffered a recovery. "*After long debate*" the Decree directed an account of what was due to the mortgagee, &c.; and by consent of *Richard* (the devisee of *John*), that the Shropshire estate should be sold, &c. And it was declared (*inter alia*) that the sum of 299*l.* (advanced by the Plaintiff to the younger children), with interest and costs, ought to be raised out of the Shropshire and Montgomeryshire estates, rateably, and in proportion to their respective values, &c.; which was ordered accordingly. Vide *Reg. Lib.*

JONES
versus
CLOUGH,
July 22, 1751.
[361]

" estate] with a
" sum for
" younger chil-
" dren after the
" father's death
" as he by will,
" duly executed,
" should direct.
" He directs by
" will with two
" witnesses
" only." A good
execution of the
power, nothing
passing from
the father.
Otherwise if by
owner of the
estate. (1)

It

JONES
versus
CLOUGH,
July 22, 1751.
[*362]

* It is observable further, that the Master of the Rolls, in the hypothetical case put in 367, does not carry it to the proper extent, *so as to render it parallel with that before the Court*, which it was to illustrate.



VOL. II.

ASHLY versus BAILLIE, July 24, 1751.

Page 368.

(Reg. Lib. 1750. A. fol. 629.)

NOTES AND OBSERVATIONS.

Real assets, followed under administration bonds, by legatees—Creditors have no such right.

Mary Pocock was not *W. Barnsley's* executrix, as stated in the report. His executors renounced, *Mary Pocock* died intestate. *William Pocock*, the brother of the Plaintiff *Jane*, took out administration to his mother *Mary Pocock*, and to *W. Barnsley*, with his will annexed.

Sarah, the devisee of *William Pocock*, was not his sister, as mentioned in the report, but his wife.

The covenant of *Mary Pocock*, was by deed poll in the lifetime of *William Barnsley* "reciting, " that it had been thus given by his will with intent to advance the Plaintiff *Jane* in marriage, " if she married with the consent of the said "*Mary Pocock*, her mother, and of *William Pocock*, her brother, or the survivor; and " whereby the said *M. P.* by *W. Barnsley's* directions, promised and agreed with him, his executors, &c. that if she survived him, the " 3000*l.* so given her for the Plaintiff, should be " paid to her, if she married with such consent." R. L.

William

**William* having refused his consent to a suitable marriage for his sister, the Plaintiff *Jane*, when it was approved by all her other friends, a suit was instituted by her against him ; in which, the Master having certified his opinion in favour of the match, it was *ordered*, that upon the marriage of the person in question with the Plaintiff, and his making a settlement, which had been proposed, the Plaintiff's brother *William* should pay the sum in question. *William* died without paying it.—*R. L.* As to the rest, see the report. Variuos other proceedings are stated in *R. L.* which are not material to be noticed here.

ASHLY
versus
BAILLIE.
July 24, 1751.
[*363]

BISHOP versus CHURCH, July 25, 1751.

(Reg Lib. 1750. A. fol. 597.)

VOL. II.

Page 371.

NOTES AND OBSERVATIONS.

(1) SEE *per* Lord *Eldon*, C. 10 *Ves.* 227, and the cases referred to in the former notes on the principal case, *antea* (288).

It must, however, be observed that Equity will not relieve in such cases, where the obligation, or covenant, is *from persons in the nature of sureties*; or where the consideration is *not* that of a *sum of money advanced*, but arises solely on the face of the instrument. This was determined in *Sumner v. Powell*, and others, *Rolls*, Nov. 19, 1816, 2 *Meriv.* 30. in which Sir *William Grant*, M. R. referred to the case of *Devaynes v. Noble*, 1 *Merivale's Reports*. 529. Quod vide.

Vide S.C.2 *Ves.* 100, et *antea* (288).

Relief in Equity, on an instrument which had been drawn by mistake as a joint bond, and in respect of which the remedy at law was gone ; the nature of the transaction implying the obligee's right to demand the consideration from the parties severally. (1)

(2) The

BISHOP
versus
CHURCH
July 25, 1751. * (2) Vide the preceding note. *Probat v. Clif-*
ford, and *Welsh v. Harvey*, mentioned p. 373, are
also cited 2 *Ves.* 102.

[*364]

The solvent obligor being dead, the demand available in Equity both against his executor and heir, though the real estate was liable only in default of the personalty. Though a legal obligation, and penalty may have become void at Law, the condition of it is considered in Equity, as an agreement to pay, regard being had to the nature of the consideration. (2)

VOL. II.

PRYSE *versus* LLOYD, July 26, 1751.

Page 372.

(*Reg. Lib.* 1750. *B. fol.* 644.)

Vide S.C. 1 *Ves.*
503, et antea.
(210).

Page 375.

PITCAIRNE *versus* OGBOURNE,
July 29, 1751.

(*Reg. Lib.* 1750. *B. fol.* 634.)

NOTES AND OBSERVATIONS.

Parol evidence admitted to show, that though a bond, on marriage, was for 140*l.* per annum, yet the agreement was for 100*l.* The bill dismissed, as founded on a private agreement, calculated to deceive a material party. It was dismissed however, without costs.

The statement of the case is continued at page 377; and it agrees with *Reg. Lib.*

It appears that the Defendant lived wholly with her uncle; see p. 379.

Walker v. Walker, cited p. 375, is in 2 *Atk.* 99; and see the note to 3 *Ves.* 58.

The case of *S. S. Company v. Oliff*, cited page 376, is also cited 1 Vol. 318, where it is called *D'Oliphant v. S. S. Company*.

MARQUIS

MARQUIS *versus* MARCHIONESS OF
ANANDALE (1), July 29, 1751.

(Reg. Lib. 1750. B. fol. 612.)

[365]
VOL. II.
Page 381.

NOTES AND OBSERVATIONS.

(1) See also another breach of the *Anandale* cause, *Ambler* 89, and *Bempde v. Johnstone*, 3 *Ves.* 198.

Thorne v. Watkins, cited p. 383. is in 2 *Ves.* 35, *et antea* (265).

Lord *Loughborough*, C. in *Oxenden v. Lord Compton*, doubted the accuracy of Mr. *Vesey's* note at the top of p. 384; observing there was nothing which called for such a dictum. Vide 2 *Ves. jun.* 76. His Lordship, in that case, determined that the produce of timber cut down and sold by order, on a report "that it would be for the lunatic's benefit," was personal assets. See 2 *Ves. jun.* 69, and also *ibid.* 261.

(2) It was declared, "that the principal money placed out on the said adjudications and securities, being part of the testator *V. B.'s* trust estate, is to be considered as part of the real estate of the said Marquis of *A.* in England; and that the interest arising upon the said securities is to be considered as part of the personal estate of the said Marquis of *A. in England.*" *R. L.*

(3) The report is *inaccurate* towards the top of p. 387, where it states that the Master was to make the apportionment between the two *personal* estates in England and Scotland. On the

A sum devised to be laid out in lands in England, in trust for A. with remainders over, was by act of Parliament secured on A.'s estate in Scotland, during his minority. A. attained 21, and became a lunatic. Held it might be called in, and laid out, pursuant to the trust, and that it was to be considered as if it were a real estate in England; the interest thereon, however, to be considered as *personal* estate in England. (2) The Master was ordered to settle a rateable proportion for the lunatic's maintenance, and his debts, between the real and

MARQUIS
versus
MARCHIONESS
of
ANANDALE(1)
July 29, 1751.
[*366]

and personal
estate in Eng-
land and those
in Scotland re-
spectively. (3)

Another sum in the Exchequer in England, arising from the sale of heritable jurisdiction in Scotland, considered as real estate in Scotland.

*contrary, the Court declared, "that the burthen
"and expence [of the maintenance and debts]
"ought to be borne in a rateable proportion be-
"tween his real and personal estate in England,
"and his real and personal estate in Scotland,
"regard being had to the respective incomes and
"produce of each estate." The Master was di-
rected "to inquire into and settle the proportions
"accordingly," &c. *R. L. fol. 613.*

VOL. II.

Page 388.

Ex parte BAX, July 30, 1751.

Exceptions to a certificate from Commissioners of Bankrupt.—Jurisdiction of Commissioners of Bankrupt in matters referred to them.—When Accounts, &c. are referred to Commissioners of Bankrupt, their jurisdiction and proceedings are analogous to accounts taken before a Master in a suit in Equity, and also to that of Auditors under the old Action of Account at Law. In the case of exceptions to the report of a Master, or the certificate of Commissioners, they must be founded on objections made before the Master or Commissioners. If the Master, &c. varies his report, &c. on the objections, the other party may except as to such parts, though the exceptant be not strictly warranted by the objections.—Commissioners, as well as a Master, may proceed ex parte, if the parties will not attend.

Page 389. *HARRISON versus SOUTHCOTE, July 31, 1751.*

S.C. 1 Atk. 528.

(Reg. Lib. 1750. A. fol. 590, 646.)

Plea allowed as
to discovery,
whether one
from whom the
Defendant pur-
chased was not
a Papist. (1)

NOTES AND OBSERVATIONS.

THE Defendants put in separate pleas.

(1) Vide *Brownsword v. Edwards*, 2 *Ves.* 248,
et antea (334). See also 15 *Ves.* 337.

LORD

LORD MONTAGUE *versus* DUDMAN,
July 31, 1751.

[367]
VOL. II.

Page 396.

NOTES AND OBSERVATIONS.

THE case of *The Lord Mayor of York v. Pilkington*, cited p. 397, is in 1 *Atk.* 282, and 2 *Atk.* 302.

BEARD *versus* E. POWIS, August 3, 1751.

Page 399.

(*Reg. Lib.* 1750. *A. fol.* 508.)

NOTES AND OBSERVATIONS.

(1) THIS *may* be a matter of convenience, and attended with no prejudice or risque in *some* cases; but the Court might in others be led to overlook the interest of material parties, if such applications were very common.

Though a cause be abated, money may be ordered to be paid out of Court without reviving the cause, upon the consent of all the parties actually interested. (1

In the principal case, the Earl of Powis, the Petitioner, stated himself to be entitled, under settlement and a private act of Parliament, to certain sums to be raised out of a 500 years term, and a sum in Old South Sea Stock, which had been chargeable with an annuity of 700*l.* to the Plaintiff *Lady Beard*, but which the Petitioner had since purchased; and after further stating that the trustees had theretofore raised some objections, and that an end might now be put to all the matters sought by the bill, so that it would be unnecessary to bring the suit to a hearing, he prayed by his petition, that he might be declared entitled,

2 c 2

&c.

[368]

BEARD
versus
E. POWIS,
August 3, 1751.

&c. and that the trustees might raise the requisite sums by sale or mortgage of the term, and that all parties might be paid their costs out of the estate of the late Marquis of Powis. Whereupon, &c. upon hearing the said petition, the said act of Parliament, &c. the Counsel for the trustees not opposing, &c.; and the Plaintiffs, Mr. J. Beard and the Lady *Henrietta* his wife, being present in Court, and examined, and declaring they have received satisfaction for the annuity of 700*l.*, and consenting, &c. His Lordship declared that the said several sums, &c. did belong to the Petitioner for his own use. And the Defendants, the trustees, not opposing it, the Accountant General was ordered to transfer to the Petitioner the O. S. Sea Annuities, and that the Defendants, the trustees, *should be at liberty* * to pay to him the other sums, when the same should be raised out of the 500 years term before mentioned. *Reg. Lib.*

VOL. II.

Page 400.

WELFORD *versus* LIDDEL, August 3, 1751.

(*Reg. Lib.* 1750. B. fol. 651.)

NOTES AND OBSERVATIONS.

Plea good in part, and in part disallowed. Plea of the statute of limitations, not to the general account prayed, but to an account between Plaintiff and his father in

(1) Besides that part of the plea and averment stated in the report, it proceeded thus: "And
" further, that they did not within six years before filing the bill, nor within six years before
" they were served with process to appear and
" answer thereto, ever promise and agree to pay,

* See the end of the Judgment, page 400 of the Report.

"to satisfy the Plaintiff, any money for any of the matters, &c. charged, or alleged by the bill, &c."

The plea was allowed, "as to all dealings and transactions between the Plaintiff and J. W.

his father deceased, *except* as to the bond charged in the Plaintiff's bill to have been en-

tered into by *Watson* to the Plaintiff, and the consideration thereof, and all circumstances

relating thereto." *And, as to that part, the plea was over-ruled. R. L.*

(2) See page 400, et vide *Jones v. Pengree*, 6 Ves. 580.

WELFORD
versus
LIDDEL,

August 3, 1751.

[*369]

in his lifetime allowed, *with an exception* of one article. (1) As to the plea of the statute on merchants accounts. (2)

Ex parte SOUTHCOT, August 6, 1751.

NOTES AND OBSERVATIONS.

Roberts's case, mentioned 402, is in 3 *Atk.* 5, 308. Vide 2 *Strange*, 1208.

son abroad, was directed where the party's mansion and more important estates lay.

VOL. II.

Page 401.

Commission of lunacy to inquire as to the lunacy of a per-

LORD DONEGAL'S Case.

Page 407.

NOTES AND OBSERVATIONS.

(1) THERE has been an alteration since Lord *Hardwicke's* time; and commissions *in the nature of those of lunacy*, are now applied to cases, where there is such an imbecility of mind as renders a person incompetent to the management of his affairs, or liable to be imposed on. See in

Ridgeway

In this case a commission of lunacy was refused in respect of a person of merely weak understanding,

[370]

and imbecile mind. (1)

L. DONEGAL'S
Case.

Ridgeway v. Darwin, 8 *Ves.* 65, 66. *Ex parte Cranmer*, 12 *Ves.* 445, 447, &c. The proper return to such a commission is, "that the party is of unsound mind; so that he is not sufficient for the government of himself," &c.; and a return, "that he is so debilitated as to be incapable of the general management," &c. being too loose, was quashed, and a new commission issued, 12 *Ves.* 445.

As to *idiots* in
the strict sense
of the word (2)

(2) See page 408.—The word "*idiot*" is a technical one, well known in our antient law, and confined to the precise case of a person "*fatuus a nativitate*." The words of the statute 17 *Ed.* II. c. 9, are "Rex habebit custodiam terrarum *fatuorum naturalium*;" whereby (says *Cowell's Interpreter*) it appears, an idiot must be "*fatuus a nativitate*." "For if he was ever wise, or became a fool by chance, &c. the King shall not have the custody of him." There are, however, some forms of writs directing enquiries, "an *idiot a nativitate extitit*," see 12 *Ves.* 451, note.

PRIME versus STEBBING, July 1, 1752.

VOL. II.

(Reg. Lib. 1751. B. fol. 569.)

Page 409.

NOTES AND OBSERVATIONS.

Covenant in
marriage arti-
cles that lands
settled were of
a certain value,

(1) VIDE *Lee v. D'Aranda*, 1 *Ves.* 1, et antea (1), et *Barret v. Beckford*, 1 *Ves.* 519, et antea (219).

which they were not: husband, by will "confirms the articles, and

and also gives his wife all his lands in A. B. for life." Held not to be a question of satisfaction, or part performance (1), but of construction; and that the wife was entitled to both interests under the intent thus collected. Further covenant from the husband, "inasmuch as he was to be absolutely entitled to all "the wife's personal estate," to settle "in respect of any sum that might come to "her afterwards, after the rate of 100*l.* per annum on her for life, for every "1000*l.*; and, upon certain contingencies, that she should be paid back a "moiety of all that he should receive as her portion." The husband obtained a Decree for 400*l.* of the wife's money, but did not receive it; held, she was entitled to a settlement according to that proportion; and the contingencies having happened, to the moiety likewise of all sums received, including the 400*l.*; since the husband might have received it.

[*371]

SCRAFTON *versus* QUINCEY, July 2, 1752.

VOL. II.

(Reg. Lib. 1751. B. fol. 572.)

Page 413.

NOTES AND OBSERVATIONS.

(1) The Defendant, who claimed under the deed of appointment, admitted that the prior deed of 1742, which created the power, was not registered, and that the deed of appointment was not registered until 1748 [which was two years after the registry of the Plaintiff's mortgage.]

Deed of appointment of lands in a register county pursuant to a power in a former deed which was not registered (1), postponed to a mortgage made subsequent to it, and registered before it.

ANONYMOUS, July 4, 1752.

Page 414

NOTES AND OBSERVATIONS.

(1) SEE *Hanson v. Gardiner*, 7 *Ves.* 305, 309, &c.

(2) Vide page 414, 415, and 7 *Ves.* 309.

Court of Equity will not interpose by Injunction. (1) In this case an Injunction to stay the use of a Market was refused. A right cannot be established against all persons under a mere bill for an Injunction. (2)

Where a question is one determinable at law, and no obstacle or inconvenience in trying it, a

LEWIN

[372]
VOL. II.
Page 415.

LEWIN *versus* LEWIN, July 6, 1752.

(Reg. Lib. 1750. B. fol. 473.)

NOTES AND OBSERVATIONS.

Construction of will.
Annuity by will to a wife, otherwise unprovided for; and sums for children's maintenance.
On a deficiency of assets; held, on the intention of the testator, that they should not abate in proportion with the general legacies. (1)

BESIDES what is stated in the report as to the bequests in favour of the wife; the testator, just before the gift of the general legacies, directed that "in case the plaintiff should survive the children he should leave, or the child she should be ensient with at his decease, then his executors should pay to her, during life, an additional sum of 40*l.* per annum, to be paid in the same manner as the 120*l.* was thereby directed and made payable."

The Court declared, "that the Plaintiff was entitled to this contingent annuity, as well as to the annuity above mentioned, in preference to the other legatees; and that the sums directed for maintenance of the children had a preference likewise." *R. L.*

See per Lord *Hardwicke* further as to this case in 2 *Ves.* 421.

The determination alluded to by Lord *Hardwicke*, p. 417, as to the abatement of an annuity, seems *Hume v. Edwards*, 3 *Atk.* 693. *Brown v. Allen*, mentioned in same page, is in 1 *Vern.* 31.

As to the doubt expressed by Lord *Hardwicke*, and the case supposed, at the bottom of p. 417, see in *Blower v. Morret*, 2 *Ves.* 420, 421, and which was determined within a few days afterwards. See the next page.

RUD-

RUDSTONE *versus* ANDERSON, July 7, 1752.

[373]
VOL. II.

(Reg. Lib. 1751. B. fol. 604.)

Page 418.

NOTES AND OBSERVATIONS.

(1) SEE also 2 Bro. 291, and 1 Bro. 260.

Where, however, a testator had bequeathed leaseholds for all the residue of his term, and interest therein at his decease, and suffered the term to expire, but continued to hold, and paid half a year's rent as tenant by the year, a subsequent lease obtained by his executrix was held to be subject to the uses of his will. *James v. Deane*, 11 Ves. 383, *quod vult*.

Abney v. Miller, cited page 418, is in 2 Atk. 593. See *Ambler* 573, and *James v. Deane*, 11 Ves. 383.

Carte v. Carte, mentioned p. 419, is in 3 Atk. 174, and *Amb.* 28.

Revocation of will.

After a devise of tithes, together with a real estate, a surrender of the lease under which they were held, and acceptance of a new lease, held to amount to a revocation; so that a republication was necessary. (1)

BLOWER *versus* MORRET, July 10, 1752.

Page 420.

(Reg. Lib. 1751. A. fol. 554.)

NOTES AND OBSERVATIONS.

(1) VIDE *Lewin v. Lewin*, 2 Ves. 415, and the bottom of page 417, *et antea*, (372).

(2) An inquiry was directed, as to whether the wife were entitled to dower; and a declaration made agreeably to what is stated at the end of the report.

the time of payment. If, however, an intention that any legacies are to be paid in full is to be collected, or reasonably inferred, it will be otherwise, as where a legacy is meant as a purchase of dower to which the party is entitled. (2).

Pecuniary legacies abate in proportion, notwithstanding a direction in the will that they are to be paid "in the first place." (1) or a direction as to

NICHOLS

[374]

VOL. II.

Page 422.

NICHOLS *versus* GOULD, July, 10, 1752.

(Reg. Lib. 1751. B. fol. 523.)

NOTES AND OBSERVATIONS.

Purchase of a reversion not set aside merely for undervalue, there being no fraud. (1)

(1) Though *mere inadequacy* is no ground of relief, where the parties during the treaty and arrangement *stood on equal terms*, the Courts are properly very jealous in scrutinizing all transactions of the kind; and they seem of late years to have leant more particularly against them especially in the case of *expectant heirs*.

Vide *antea* (297) in the notes to *E. Chesterfield v. Janssen*. *Evans v. Chesshire*, mentioned *ibid* and reported p. 300, together with *Peacock v. Evans, et c contra*, 16 *Ves.* 512. See also in *Bowe v. Heaps*, 3 *Ves. & B.* 117.

Page 424.

RATTRAY *versus* DARLEY, July 11, 1752.

(Reg. Lib. 1751. B. fol. 546.)

NOTES AND OBSERVATIONS.

Agreement. The Defendant having entered into a written agreement "to leave by his will," to a woman he had lived with, the value of the rents he had received from her estate, subject to specified deductions;

(1) THE report is *inaccurate* in stating that the agreement was the subject of the cross bill, and relied on by the Plaintiff in the cross bill, who was the Defendant in the original suit. In point of fact it was the subject and foundation of the original bill. The Defendant, by his cross bill, attempted only to set up a kind of discharge, release, and offer to account by Anne G. the Plaintiff in the original suit.

The

*The agreement, as set forth by the original bill, was stated thereby to have been given by the Defendant to the Plaintiff *Anne* in writing, in the terms following: "I do hereby agree to leave Mrs. *A. G.* by my last will and testament, the value of the rents I have received of her estate, deducting thereout what she stood indebted to me for what I paid for her before this time, except clothes. And I do hereby acknowledge that I have this day received of her the sum of 5*l.* in full of all accounts and demands to this day, whatsoever; as witness my hand this 2d October, 1749, T. DARLEY." As to the original bill, the Court (*inter alia*) directed an inquiry, whether, on the last mentioned day, being the date of the agreement entered into by the Defendant with the Plaintiff *Anne*, she was indebted to him for any money which he had paid for her before that time, except for her maintenance, or that of her children, or for the use of the family, or for clothes, or for presents; and if so, the Defendant was to be allowed the same in account." And it was declared, "that what should be coming on the balance of that account was to be considered as a debt from the Defendant to the Plaintiff *Anne*, to be paid her after his death." And after his death the Plaintiff, or her representatives, were to be at liberty to apply. The Defendant was to pay the costs up to the hearing, and his cross bill was dismissed with costs.

RATTARY
versus
DARLEY
July 11, 1752.
[*375]

ductions; an account was forthwith directed, with a declaration that the balance in her favour was to be considered as a debt from the Defendant, payable after his death. (1)

[376]
VOL. II.
Page 425.

ATTORNEY GENERAL *versus* BRERETON,
and BRERETON *versus* TAMBERLAINE,
July 14, 1752.

(Reg. Lib. 1751. A. fol. 577.)

NOTES AND OBSERVATIONS.

Directions of the Court on establishing a right to hold a perpetual curacy, and as to the nomination thereto by the patron. The question whether a perpetual curacy or no may be judged of by three concurring circumstances. First, whether there are parochial rights belonging to the chapel in question; *secondly*, with reference to the rights of the inhabitants within the district; and *thirdly*, as to the rights and dues belonging to the curate—Such a curate not removeable

SEE page 429.—The order made was as follows:
“ Whereupon, &c. And the Court having proposed
“ to the parties in these causes, whether any of
“ of them are desirous to try any of the questions
“ arising in these causes at Law; and the Counsel
“ for all parties declining to try the same at Law;
“ His Lordship doth Declare that the Curacy or
“ Chapel of Flint is a Perpetual Curacy, and that
“ the nomination of a Curate to the said Chapel
“ belongs to the Vicar of the parish of Worthop
“ for the time being, and his successors in that
“ Vicarage; and that the Curate *so nominated*,
“ *being licensed* by the Bishop of St. Asaph, for
“ the time being, *is not removeable at the pleasure*
“ *of the Vicar of W., but has a right to hold such*
“ *Curacy for such time and in such manner as other*
“ *perpetual Curates have by law a right to hold*
“ *their Curacies*: and therefore upon the original
“ information doth Order and Decree, that the
“ right of the relator *R. T.* to the said Curacy,
“ with its appurtenants, and to all revenues, profits,
“ and duties thereunto belonging, or therewith
“ usually enjoyed, be established according to the
“ declaration aforesaid.” The charitable benefaction

at

*tion of 20*l.* *per annum* to the Curate was also established; and *possession of the Chapel was ordered to be delivered to the relator*: an account of the profits directed, &c. The right of the Vicar, the Plaintiff in the cross cause, and of his successors, to nominate a Curate of the said perpetual Curacy of F. on all vacancies thereof was established. The cross bill was dismissed, as to all other matters. Two of the Defendants were to be paid their costs, but none were given on either side, as between the other parties. *Reg. Lib. fol. 578.*

ATTORNEY
GENERAL
versus
BREKENTON,
and BREKENTON
versus
TAMBERLAINE,
July 14, 1752.

[*377]

at pleasure.
Presentation to
a church, or
nomination to
a perpetual
curacy, may be
by parol.

A bill is the proper mode of establishing a right to a perpetual curacy, &c. &c. and not an *information* in the name of the Attorney General, *except in the case of charities.* *Augmentations of vicarages, &c. form such an exception.* Costs.

TREVANION *versus* VIVIAN, July 14, 1752.

(No Entry.)

VOL. II.
Page 430.

NOTES AND OBSERVATIONS.

(1) SEE also *Bullock v. Stones*, 2 *Ves.* 521, *et postea* 397; 2 *Roper on Legacies* 205; and *Leake v. Robinson*, 2 *Meriv.* 384.

Green v. Ekins, cited page 430, is in 2 *Atk.* 473. *Butler v. Butler*, cited *ibid.* is in 3 *Atk.* 58.

Under a bequest of the *residue* of a personal estate to A. if he attain 21, the profits will accumulate. (1)

HELE *versus* GILBERT, July 16, 1752.

(*Reg. Lib.* 1751. *A. fol.* 584.)

Page 430.

NOTES AND OBSERVATIONS.

(1) As to what will, or not, pass under a bequest of

Arrears of annuity held to pass

HELE
versus
GILBERT,
July 16, 1762.
[378]

pass under a
bequest of "all
" arrears of rent
" and interest
" due."
China held to
pass under a be-
quest of "fur-
niture." (1)
Store-tee con-
tra.

of "furniture," or "household furniture," see 2 *Roper on Legacies* 249, &c. and especially *Le Farrant v. Spencer*, 1 *Ves.* 97, *et antea* (68), and *Stapleton v. Conway*, *antea* (185); notes to 1 *Vesey*, 427-8.

The testator had in his house some *store-tee*. This was ordered to be delivered up to his residuary legatee. *R. L.* So in *Porter v. Tournay*, 3 *Ves.* 311, *wine and books* held not to pass.

Money at a banker's was held to pass under a bequest of all debts due to testator at his death, *Carr v. Carr*, 1 *Meriv.* 541. note.

VOL. II.

Page 431.

LEWIS *versus* NANGLE (1), July 17, 1752.

Vide *Ambler*
150.

NOTES AND OBSERVATIONS.

Parties.—

On a bill by de-
visee to redeem,
the heir at law
an unnecessary
party.

(1) SEE this case *Ambler* 150. Et vide *Clinton v. Hooper*, 1 *Ves.* jun. 173.

Page 431.

WARD *versus* TURNER, July 20, 1752.

(No Entry.)

NOTES AND OBSERVATIONS.

In the case of
*donationes mor-
tis causæ*, an ac-
tual delivery is
indispensable to
vest the pro-
perty, if the sub-
ject matter is
capable of deli-
very. If it be not
so, there must
be

(1) As to *donationes mortis causæ*, see 1 *Roper on Legacies*, 1, 2, &c. particularly *Tate v. Hilbert*, 2 *Ves.* jun. 111; *Snelgrove v. Bailey*, 3 *Atk.* 214; *Gardner v. Parker*, 3 *Mad. Rep.* 184; *Walter v. Hodge*, 2 *Swanst.* 92, *et seq.* with the notes.

A similar rule prevails also as to gifts *inter vivos*. Vide in *Tate v. Hilbert*, 2 *Ves.* jun. 111, &c.; and *Antrobus v. Smith*, 12 *Ves.* 39, &c. See also in *Tomkyns*

Tomkyns v. Ladbroke, 2 *Ves.* 591, 594, 595, *et postea*, 421; *Walter v. Hodge*, 2 *Swanst. &c.* 92.

WARD
versus
TURNER,

Bailey v. Snelgrove, cited p. 432 and 431, is in July 20, 1752.
3 *Atk.* 214. *Ryal v. Rowles*, referred to p. 436, is in 1 *Ves.* 348. *Richards v. Syms*, cited *ibid.* is [379]
in 2 *Atk.* 319. *Amb.* 319.

See page 442; *et vide the notes, antea* (163,) to *Walmsley v. Child*, 1 *Ves.* 341, 345, &c.; and those *antea* (284) on the case of *Askew v. The Poulterers' Company*, 2 *Ves.* 89.

be a delivery of what is equivalent to it at law. (1)
In the case of stock, &c. delivery of the re-

ceipts, &c. not sufficient to constitute such a gift, though strong evidence of the intent. Formerly, there could be no action at law on a bond without a profert.

MITFORD *versus* FEATHERSTONHAUGH,
July 21, 1752.

VOL. II.
Page 445.

(*Reg. Lib.* 1751. *B. fol.* 525 (1).)

NOTES AND OBSERVATIONS.

(1) THE matter in question came forward on exceptions, which were over-ruled.

When exceptions have been over-ruled, it is not the practice to enter the points in *Reg. Lib.*

(2) See *Detillin v. Gale*, 7 *Ves.* 583.

In directing accounts, where there has been usuary, extortion, or oppression, the Court often, by its Decree, directs

every thing doubtful to be taken most strongly against the person guilty of such proceedings. (2)

VOL. II.

Page 445.

BUDEN *versus* DORE, July 22, 1752.

(Reg. Lib. 1750. A. fol. 484.)

NOTES AND OBSERVATIONS.

Exceptions.—
Lord Hard-
wicke held that
in the case of a
bill for disco-
[380]
very of a De-
fendant's title,
he might object
to make such
discovery by his
answer (1), as
well as by plea,
&c.

(1) THIS doctrine seems not inconsistent with the rules of good pleading; having regard to the distinction His Lordship lays down in the Report.

It seems, however, questionable, whether subsequent decisions, and many judicial observations, have not *shaken* the rule deducible from the principal case, and subjected a party to plead, or demur, instead of "*objecting to answer by an answer*," except in cases of imputed crime, or of penalty or forfeiture.

See much reasoning, and most of the former cases referred to in 11 *Ves.* 285, 296, 303, &c. &c. See also 16 *Ves.* 382, &c. ; and 2 *Ves.* and *B.* 364, &c.

As to the excepted cases of imputed crime, penalty, and forfeiture, see *Beames on Pleas in Equity* 270, and *Parkhurst v. Lowten*, 1 *Meriv.* 391.

The BISHOP of WINCHESTER *versus*
FOURNIER, July 23, 1752.

VOL II.
Page 445.

(Reg. Lib. 1751. A. fol. 593.)

Rolls.

NOTES AND OBSERVATIONS.

(1) SEE also the case of *Ward v. D. of Bucks*, on appeal, *Dom. Proc.*; 3 Bro. P. C. 581 and 587, octavo edition; and fol. 93, &c. folio edition.

This case is the one alluded to in the note at the end of the principal case, p. 449.

A promissory note, suspicious in itself (1) under the circumstances, and the admitted object of it being an improper one,

even if the note were actually genuine; decreed, at the instance of the person alleged to have given it, to be deposited with the Register of the Court (1) in the first instance; with a declaration that the Plaintiff was entitled to be relieved against it, without preventing the Defendant from bringing an action on it within a reasonable time; and if delay in so doing, then to be delivered up.

SENHOUSE *versus* EARL, July 23, 1752.

[381]
VOL. II.
Page 450.

(Reg. Lib. 1751. B. fol. 650.)

NOTES AND OBSERVATIONS.

ALL that appears relative to the principal case in *Reg. Lib.* is, that the plea was ordered to stand for an answer, "with liberty for the Plaintiff to "except only as to the charges in the Bill relating "to notice of the articles or settlement therein "mentioned, and any circumstances relating to "the point of notice."

Held that a plea of foreclosure is not good without the foreclosure has been made absolute. Though a mortgagee is not bound to discover his title deeds,

2 D

There

SENHOUSE
versus
EARL,
July 23, 1752.

deeds, where he
denies notice; he
must not only
deny notice in
general, but all
special facts and
circumstances
charged, relat-
ing to it.
See also 8 Atk.
815.

There seems a *mistake throughout* the whole paragraph relative to the case of *Jones v. Kendrick*, mentioned by Lord *Hardwicke*, p. 450. It is true there was originally a plea of a foreclosure, and that such plea was overruled. *It could not*, however, have been overruled on the ground reported, because the foreclosure had actually been made absolute; and it was not overruled by Lord *C. King*, but by Lord *Macclesfield*. See 5 *Bro. P. C.* 244, 247, octavo edition. The appeal to the House of Lords was not from the decision as to the plea, but from Lord *C. King's* dismissal of the Bill itself, which sought a redemption.

The Plaintiffs in that suit afterwards filed a Bill of Review, as for error apparent, in respect of several matters of form; to which the same Defendant put in a demurrer, which was allowed by Lord *C. King*.

The appeal to Dom. Proc. was by the original Plaintiffs from this decision; and the matter was ultimately compromised by an agreement, made an Order of the House of Lords.

See the whole of the case accordingly, 5 *Bro. P. C.* 244, to the end of p. 253, in the octavo edition, and in the third vol. p. 315, &c. of the folio edition.

[382]

CHETWYND *versus* LINDON, July 23, 1752.

VOL. II.

(Reg. Lib. 1751. A. fol. 350.)

Page 450.

NOTES AND OBSERVATIONS.

(1) VIDE 2 *Ves.* and B. 118, 121, 124.

(2) See 2 *Ves.* 493.

Demurrer
should precisely
distinguish each
part of the bill.

demurred to. (1) Though parties may demur to discover any thing which may prove illicit cohabitation, or what may subject them to pains, penalties, or ecclesiastical (2) censures, &c. a charge against persons for a conspiracy, or attempt to set up a bastard child, is not demurrable unto; that not being *per se*, an indictable offence.

GRIFFITH *versus* HOOD, July 24, 1752.

Page 452.

(Reg. Lib. 1751. A. fol. 507.)

NOTES AND OBSERVATIONS.

THE Bill was filed by *the husband and wife*.

(1) See 1 *Fonb. T. E.* 94, &c.

The money in question was ordered to be paid into Court, and laid out in the name of the Accountant General, without prejudice, and subject to further order: and the Defendant *Hood* was directed, "within two months from the time of the Decree, to pay unto the Plaintiff, the wife, or some person authorised by her, for her separate use, the arrears of the interest thereof, at the rate of 4 *per cent. per annum*, accrued from 18th day of November, 1749, which was to be without prejudice to any of the parties." *R. L.*

Baron and
Feme.
Where a suit is
relative to the
separate estate
of a wife, the
bill ought to be
filed by her pro-
chein amy. If,
however, such a
suit be instituted
[383]
by the husband
and wife jointly,
the Court will
secure the fund
for the wife, in
the name of
trustees, or the
accountant ge-
neal. (1)

VOL. II.

Page 452.

MORRIS *versus* The LESSEES of LORD
BERKELEY, July 25, 1752.

Injunction to stay building not granted in cases of mere injury or inconvenience to property or persons adjoining, or otherwise, except by agreement, or the building being of such a nature as to stop up ancient lights. (1)

NOTES AND OBSERVATIONS.

(1) SEE the next case in 2 *Ves.* 453, of the *Attorney General v. Doughty*; *Ryder v. Bentham*, 1 *Ves.* 543, and the notes thereon, *antea* (242); particularly the case 1 *Dick.* 163, 165, and *Attorney General v. Nichol*, 16 *Ves.* 338.

It appears from thence, that the Court will not interpose upon every degree of darkening, even antient, lights. See 16 *Ves.* 343.

Page 454.

GRAYSON *versus* ATKINSON, July 17, 1752.

NOTES AND OBSERVATIONS.

Devise, Execution and Attestation of.—
Not necessary under the stat. of Frauds that a testator should sign in the presence of the witnesses. His acknowledgment [384] of his handwriting is sufficient, although done to the several witnesses at different times. (1)

Where

(1) VIDE *Ellis v. Smith*, 1 *Ves.* jun. 11, &c. and Mr. *Vesey* junior's very judicious notes. See also *Addy v. Grix*, 8 *Ves.* 504.

It was determined in *Croft v. Pawlet*, 2 *Stra.* 1109, that it is not absolutely necessary to mention, in the form of attestation, the fact of the signature of the witnesses in the devisor's presence. And the Court observed, that the fact of witnesses, having, or not, complied with such requisites, was evidence to be left to a jury.

(2) See *Bootle v. Blundell*, 1 *Cooper, Ch. Rep.* 136, 137. S. C. 19 *Ves.* 494. Vide also 2 *Bro.* 503; 4 *Bro.* 230, 231; and 5 *Ves.* 404; likewise *Ogle v. Cook*, 1 *Ves.* 177, *et antea* (103).

A

A witness to a devise having become *insane*, proof of his hand-writing was allowed. *Bennett v. Taylor*, 9 Ves. 381 ; and in the case of *Mackenzie v. Frazer*, 9 Ves. 5, where a will was 30 years old, and no account could be given of one of the witnesses, further proof was dispensed with. See also 19 Ves. 505.

(3) See, however, *Lord Carrington v. Payne*, 5 Ves. 404, and the cases in the preceding note.

A Court of Law, in the trial of an *Action* on a will, is content with the examination of *any one* of the attesting witnesses ; but on the trial of an *issue, devisavit vel non*, directed by a Court of Equity, there must be an examination as to *all* the witnesses. *Bootle v. Blundell*, *Coop. R.* 136, and 19 Ves. 494, 500, *et seq.*

Notwithstanding the stress laid by Lord *Hardwicke*, in pp. 457 and 459, as to the benefit supposed to be contemplated by the Statute from the proof or disproof of the *hand-writing* of a witness, or of a devisor, it is not to be supposed the framers of that Statute could have meant it to operate as an *interdiction* against the making of a devise, or the attestation of one, by *illiterate persons, utterly unable to write their names*. It is, besides, to be observed, that learning was then by no means so common as in the time even of Lord *Hardwicke*. It is rather curious, that there does not appear any *printed* case, in which it was made questionable, whether an attestation of a devise by *marksmen* was good, between the passing of the Statute of Frauds and the year 1803. Mr. Serjeant *Hill*, however, stated there had been several such cases. See *Harrison v. Harrison*, 8 Ves. 185, 186 ; and *Addy v. Grix*, *ibid.* 504.

GRAYSON
versus
ATKINSON,
July 17, 1752.

Where a will is to be established in equity, it must be proved by each of the subscribing witnesses if living ; and if dead, their deaths must be substantiated, &c. (2)

One of the witnesses being beyond sea, there should have been a commission to examine him ; and the Court could only direct a Trial at Law (3).

Attestation of *marksmen* good under the stat. of Frauds.

[385]

It

GRAYSON
versus
ATKINSON,
July 17, 1752.

It should seem that Lord Hardwicke's reasoning at the top of p. 458, is very sound, notwithstanding the dicta attributed to his Lordship elsewhere, and to Lord C. J. Willes in the Rep. 1 Ves. jun. 14-16. See Mr. Vesey junior's note, *ibid.* pp. 17 and 18. Vide etiam per Lord Eldon, C. 18 Ves. 183.

VOL. II.

Page 46 1

S.C. 1 Dick. 173.

Revivor is allowed for costs taxed. Costs die with the party unless taxed; (1) and even where taxed in the life-time of such party, and

the person to pay them is in prison, he will be discharged unless there be a revivor within a reasonable time; this is in like manner as in a case of sequestration. Difference between process at Law and in Equity.

Process in Equity is in *personam*, for a contempt; not so at Law.

Writs of execution at law, and writs of Fi. Fa. do not abate.

Writ of sequestration in equity does abate. The Court, however, will allow time to revive.

Process of sequestration in equity nearly resembles that of Fi. Fa. at law; but there is the above material distinction, in case of the party's death.

WHITE versus HAYWARD, July, 1752.

NOTES AND OBSERVATIONS.

(1) SEE, however, *Johnson v. Peck*, the next case, and 2 Ves. 465; *Kemp v. Mackrell*, 3 Atk. 812, and 2 Ves. 580, *et postea*. Also *Blower v. Morrets*, 3 Atk. 772; *Hall v. Smith*, 1 Bro. 438; and *Morgan v. Scudamore*, 2 Ves. jun. 313.

1. JOHNSON *versus* PECK, July 25, 1752.

[386]
VOL. II.

(Reg. Lib. 1751. A. fol. 540.)

Page 465.

NOTES AND OBSERVATIONS.

(1) SEE the preceding case, and the references. Though the strict rule be, not to allow revivor merely for costs, which have not been taxed, (1) the Court leans against enforcing it, if there be any thing in the Decree yet remaining to be executed.

TANER *versus* IVIE, July 27, 1752.

Page 466.

(Reg. Lib. 1751. B. fol. 661.)

NOTES AND OBSERVATIONS.

(1) SEE also *Whittaker v. Morlar*, 1 Cox. Ca. Prochein amy. Ok. 285. The Court, however, in *Pearce v. Pearce*, The next friend of an infant allowed costs, refused a next friend his costs, where he might, by reasonable diligence, have known the fact of a recovery having been suffered; notwithstanding the infant's benefit was his only object in the suit. 9 Ves. 548, and in *Jones v. Powell*, 2 Meriv. 141. Master having previously reported the suit for the infant's benefit (1). Sir W. Grant, M. R. refused a reference at the instance of a next friend, to enquire whether a suit which he himself had instituted, was for the infant's benefit. Executors may make a valid assignment of their testator's property in respect of their own debts, or where they apply the consideration

Nugent v. Gifford, 1 Atk. 463, mentioned pp. 466-7, is cited in *Jacomb v. Harwood*, 2 Ves. 269.

The other case, mentioned p. 467, relative to the executors of the *D. of Bucks* and *Mead the Banker*,

is

derat' n

TANER
versus
IVIE,
July 27, 1752.

deration of it to
their own pur-
poses, if no
fraud in the
other party, or
reasonable
ground of sus-
picion in the
transaction (2).

is that of *Mead v. Lord Orrery*, 3 *Atk.* 235. See these cases much commented on by Lord *Eldon*, C. in *M'Leod v. Drummond*, 17 *Ves.* 152. That case was first decided at the Rolls. See 14 *Ves.* 353, and affirmed on appeal *ubi supra*, 17 *Ves.* 152. Quod vide.

(2) See *Nugent v. Giffard*, and *Mead v. Lord Orrery*, above referred to. Per Lord *Hardwicke*; also p. 469; and *Jacomb v. Harwood*, 2 *Ves.* 265, &c. *et antea* (338).

[387]
VOL. II.

Page 470.

CHAMP versus MOODY, July 28, 1752.

(Reg. Lib. 1751. A. fol. 501.)

NOTES AND OBSERVATIONS.

Generally
speaking, to
warrant a re-
servation of in-
terest on further
directions, it
should have
been directed on
the original De-
cree.

(1) VIDE *Creux v. Hunter*, 2 *Ves.* jun. 157, &c. and the note to p. 169, *ibid.*

See also the cases in the note *antea* (293), on the *D. Bedford v. Coke*; likewise 2 *Ves.* jun. 164, and *Bickham v. Cross*, 2 *Ves.* 471 (the next case but one.)

The case, however, of a direction for a trial at law is an exception; and there may be others founded on the peculiar nature of a case (1).

Ex parte WATKINS, July 29, 1752.

(Reg. Lib. 1751. B. fol. 540.)

VOL. II.

Page 470.

NOTES AND OBSERVATIONS.

It has long been *quite settled*, that the Court will appoint a guardian, *and allow maintenance*, on a mere petition. See *ex parte Salter*, 3 Bro. 499, and 2 Dick. 769.

Guardian appointed merely on petition, without any suit in Court, but not without a reference to the Master.
(1)

BICKHAM *versus* CROSS, July 29, 1752.

(Reg. Lib. 1751. A. fol. 561.)

[388]

Page 471.

NOTES AND OBSERVATIONS.

(1) THIS case turned on *very particular circumstances*. See 2 Ves. jun. 160, 164, 166, where Lord Loughborough, C. though he, *at first*, thought it a singular case, said, "Lord Hardwicke was perfectly right, and did not vary from his general reasoning."

Interest computed on various sums reported due (1), and also on all arrears of interest (on other sums) and on costs.

The Petitioner's demand consisted of several particulars. The most material one was in respect of a bond for 900*l.* given by the Petitioner's father on her marriage; the interest whereof was to be paid to her separate use, till laid out in a purchase of lands; the profits of which lands, when purchased, were to be paid in like manner. This principal sum, and a very large arrear of interest thereon, had been reported due to her; as likewise a sum

BICKHAM
versus
CROSS,
July 29, 1762.

[389]

sum of 484*l.* 18*s.* 9*d.* for principal and interest, on account of a legacy; another sum of 194*l.* 7*s.* 3*d.* paid by her mother (whose general legatee and executrix she was) for interest of a bond and mortgage, due from her brother's estate; another sum of eleven guineas paid by her; and a sum of 290*l.* reported due to her for costs. The Petition prayed, that these sums might be consolidated together, and carry interest from the date of the Report, at 4*l.* and a half *per cent.* &c. &c. The Court referred it back to the Master "to carry on" the Petitioner's subsequent interest, in manner following: *viz.* upon the principal sum that carried interest at 5 *per cent. per annum*, at the rate "of 5 *per cent.*; and on the other principal sums, "and also on all the interest and costs, at the rate "of 4 *per cent.*; and also to tax her subsequent "costs." *Reg. Lib.* 1751. *A. fol.* 561. See also per Lord Loughborough, *C. 2 Ves.* jun. 160; where, however, there is an omission of the above words, "and also on all the interest and costs." See *ibid.* 164. 166. As to the general practice, see *Creuze v. Hunter*, 2 *Ves.* jun. 157, &c. See also *Champ. v. Moody*, the last case but one, and 2 *Ves.* 470; likewise 2 *Ves.* 661, 662; and *Morgan v. Morgan*, 2 *Dick.* 643.

EARL OF POMFRET *versus* LORD WINDSOR,
July 30, 1752.

VOL. II.
Page 472.

(Reg. Lib. 1751. A. fol. 580.)

NOTES AND OBSERVATIONS,

(1) SEE some observations upon this case in *Hercy v. Dinwoody*, 2 *Ves.* jun. 91.

(2) See *Stackhouse v. Barnston*, 10 *Ves.* 453.

The case referred to, p. 476, of *Lord Portsmouth v. Vincent*, is the one in 1 *Ves.* 430.

As to what appears at the bottom of p. 476, on the presumption arising from no demand being made on a bond for 18 years, it is to be observed, that a presumption *from mere length of time* will not be raised under a less term than the statutory limitation of 20 years; though satisfaction may be presumed, *if evidence be given in aid*; as if an account had been settled in the interim, without notice taken of the demand. *Oswald v. Leigh*, 1 *T. R.* 270. See also 12 *Ves.* 265, 266, and 377. But more especially the well considered doctrine in the most important case of the *Marq. Cholmondeley v. Lord Clinton*, 2 *Jacob & Walker* 1, *et seq.*

(2) See pp. 479, 480, and *Lake v. Skinner*, 1 *Jacob and Walker* 9, &c. with the references.

(3) A private Act of Parliament, *as to strangers*, is considered only in the light of any private conveyance.

(4) See the *Rep.* p. 482.

(5) See in *Townsend v. Lowfield*, 1 *Ves.* 37, *et antea*, 32; also 1 *Ves.* 297, *antea* 152; and 2 *Ves.* 565, post 416. As to the general principle of pre-

sumption

Fine by persons in possession and non-claim, the legal estate being in trustees, held not to bar an equitable charge under the deed of trust, though a great length of time had elapsed. (2) In proving exhibits *vid voce*, the rule is *invariable*, that the party can only examine the

[390]

witness to the *hand-writings*. Nothing therefore can be used as an exhibit proved *vid voce*, in respect of which the other party would have had a right to cross-examine. (2) It seems, however, that the benefit of such instruments, on the one side, and the right to controvert

E. of POMFRET
versus
L. WINDSOR,
July 30, 1752.

controvert on the other, is a proper subject of adjustment either in the Master's office, under a commission by virtue of his certificate; or under a trial at law. See p. 480.

Purchaser for valuable consideration, without notice, is not bound by a private act of Parliament. (3) Executors and administrators are considered as trustees in many instances.

(4) Length of time, how far a bar in equity to an ac-

[391]

count. (5) Though stale accounts are discouraged (6), yet an administratrix, who was to see to the execution of a trust out of real estate, and was

accountable for the amount, was not allowed to take any advantage from the length of time elapsed; and held that she ought to have seen the trust executed.

A second mortgagee, with notice of a former mortgage, but without notice of a former

sumption from length of time, see 12 *Ves.* 265, and the cases above referred to by note (1).

(6) See the Rep. p. 483. Et vide *Hercy v. Dinwoody*, 2 *Ves.* jun. 87; and *Pearson v. Belchier*, 4 *Ves.* 627.

The Author of these notes submits, that there being some mistake or complication of terms, about the middle of page 484, in the Rep. the sentence would more properly run thus:—

“If then this trust for raising 20,000*l.* has not been executed, what bar is there from length of time [to a person coming] against an administratrix, calling for an execution of this trust of the real estate [which trust that administratrix ought to have seen performed]?”

The latter words, it will be seen, are substituted for those now in the Report; viz. “which belongs to the administratrix and representative of the personal estate to do.”

(7) The Court (*inter alia*) declared accordingly, “that so much as should be coming to the Plaintiffs for their share of the residue of the 20,000*l.* and interest, was an incumbrance, &c. prior and preferable to the mortgages insisted upon by the Defendants; those mortgages being only of an equitable estate; and it appearing further, that the said *B. H.* the first mortgagee, had notice of the trust, under which the Plaintiffs claim.” *Reg. Lib.* 584.

(8) See *Swynfen v. Scawen*, 1 *Ves.* 99, et ante 68.

former trust-charge antecedent to both, and of which the former mortgagee had notice, was obliged to take, subject to that charge. (7)

Though, in general cases, *portions out of real estate* carry interest in their nature without particular mention (8); yet in the principal case, as a great length of time had elapsed, and some degree of laches occurred, with some complication of circumstances relative to the portion itself, the commencement of interest was fixed from the time of the sum to be raised having become a duty decreed upon a former occasion.

HARRISON *versus* RUMSEY, July 30, 1752.

(No Entry.)

VOL. II.

Page 488.

NOTES AND OBSERVATIONS.

On Petition.

[* Held, that "*infants are bound*, by a Decree taken by consent, though no reference to the Master, to enquire whether it was for their benefit; *the Court itself* proceeding on the idea that it was for their benefit. 1 *Brown*, 484, "488." Note to the third edition.] See further *Downing v. Cage*, 1 *Eq. Ca. Ab.* 165. *Bradish v. Gee*, *Ambl.* 229. *Norcot v. Norcot*, 7 *Vin. Ab.* 398. *Pl.* 13.

Decrees by consent, not set aside*.

It appears, however, that the Court has reversed a Decree made on Consent. See *Butterfield v. Butterfield*, *antea* 81.]

Ex

[392]

VOL. II.

Page 489.

Assignees of a bankrupt are not compellable to pay what is really due on a transaction attended with usury, under the general jurisdiction in bankruptcy. It is otherwise where they apply to a Court of Equity by a bill to be relieved. (1)

Ex parte SKIP.

NOTES AND OBSERVATIONS.

[* SEE 1 *Atk.* 125, and *Douglas*, 708.]

Vide also *ex parte Mather*, 3 *Ves.* jun. 372, and *Cooke's Bankrupt Laws*. 203 (sixth edition), and p. 187 of the other editions.

(1) "There is great confusion in the language of every book relating to the subject [of bankruptcy, when] speaking of the Court of Chancery. That jurisdiction is not in the Court, but in the individual who happens to hold the Great Seal, by a special commission to issue commissions of Bankrupt." Per Lord Eldon, C. 8 *Ves.* 782, 783. Et vide in *Phillips v. Shaw*, 8 *Ves.* 250.

Page 489.

ANONYMOUS, July 1752.

NOTES AND OBSERVATIONS.

The affidavit to ground a writ of *ne exeat regno*, must not only state that the Defendant is equitably indebted in a specific sum, but must mention the facts on which it arises, &c. (1)

(1) For the general doctrine as to this writ, see Mr. Beames's useful tract upon it. The former edition of this work referred to 1 *Cox. P. W.* 263, fifth edition; 1 *Bro.* 376; *Cook v. Ravie*, 6 *Ves.* 283; *Shaftoe v. Shaftoe*, 7 *Ves.* 171; *Oldham v. Oldham*, and *Etches v. Lance*, *ibid* 410, 417; *Tomlinson v. Harrison*; *Jones v. Sampson*; *Amsincke v. Barkley*, 8 *Ves.* 32, 593, 594. Also 10 *Ves.* 63, and *Jackson v. Petrie*, *ibid* 164.

Ex

Ex parte ARTIS, August 1, 1752.

[393]
VOL. II.

NOTES AND OBSERVATIONS.

Page 489.

[* SEE 1 *Atk.* 251, and 2 *Blacks. Rep.* 1106, 1107.]

(1) Vide per Lord *Eldon*, C. 14 *Ves.* 574, and *Cooke's Bankrupt Laws*, 154, &c. sixth edition, and p. 139, &c. of the other editions; and more especially Stat. 49 Geo. III. c. 121. s. 17.

Bankrupt.—
In the case of common personal annuities, after a bankruptcy (1), a value is set upon them, and a dividend paid in respect of the

sum thus ascertained. But where there has been a Decree for payment of the arrears, and for placing out a specific sum to secure the growing payments, the annuitant will still have a right to have the sum placed out; and if the dividends are not sufficient, the remainder must be made good out of the capital, to be raised by sale from time to time.

FINCH *versus* FINCH, October, 24, 1752.

Page 491.

(*Reg. Lib.* 1751. B. fol. 613).

NOTES AND OBSERVATIONS.

(1) Vide *Brounsword v. Edwards*, 2 *Ves.* 243, et *antea* 334.

A Defendant who did not except to the first report of insuf-

iciency of an answer, held not absolutely excluded from insisting on the same matter in his second answer.

Though a Defendant is not bound to answer what may subject him to ecclesiastical penalties (1); or whether he is or not married to a woman he cohabits with; or whether he is an alien, &c.; he must, in a proper case, answer whether he hath, or not, a *legitimate son*.

LORD

[394]
VOL. II.

Page 495.

LORD NORTH AND GUILDFORD *versus*
PURDON, July 1752.

NOTES AND OBSERVATIONS.

Bequest of residue, to go over in a particular event (which took place) to ; (leaving a blank). The executors excluded by such inchoate gift, and the next of kin entitled (1).

Next of kin are

not excluded from taking the residue by a gift to them of legacies, &c. (2)

(1) VIDE particularly *The Bishop of Cloyne v. Young*, 2 Ves. 91, *et antea* (285); *Blinkhorn v. Feast*, 2 Ves. 27, *et antea* (262); *et Langham v. Sunford*, 17 Ves. 435; and on appeal before Lord Eldon, C. 2 Meriv. 6. See also *White v. Williams*, 3 Ves. & Beames 72.

(2) Vide the end of the Report, page 406; *Andrew v. Clark*, 2 Ves. 162, *et antea* (314); and *Seley v. Wood*, 10 Ves. 71.

Page 496.

ANONYMOUS, July 10, 1754.

NOTES AND OBSERVATIONS.

Depositions *de bene esse* published, saving just exceptions,

the witnesses being dead before an opportunity to have examined them in chief (1), though there was delay in the cause on both sides.

(1) VIDE *Gason v. Wordsworth*, 2 Ves. 336, 337, *et antea*, 353 and 357.

EARL

EARL TYRCONNEL *versus* DUKE of
ANCASTER.

[395]
VOL. II.

Page 499.

NOTES AND OBSERVATIONS.

Lady Blanford's case, cited p. 502, is in 2 *Atk.* 542.

Hervey v. Hervey, cited p. 503, is in 1 *Atk.* 561.

ATTORNEY GENERAL *versus* CORPORATION of BEDFORD, *July 15, 1754.* Page 505.

(*Reg. Lib. 1753. A. fol. 559.*)

CHAPMAN *versus* SMITH, *July 17, 1754.* Page 506.

(*Reg. Lib. 1753. A. fol. 523.*)

NOTES AND OBSERVATIONS.

(1) SEE *O'Connor v. Cook*, 6 *Ves.* 665, and 8 *Ves.* 535. Also *Richards v. Evans*, 1 *Ves.* 39, *et antea* 34.

(2) So rankness of an alleged *modus* is only *prima facie* evidence *de facto*, as to the non-immemoriality, and is not conclusive *by itself* in point of law. Vide 6 *Ves.* 665, 672. 8 *Ves.* 534, 539.

In the principal case the matter was compromised

Doubtful *modus* not determined by a Court of Equity, without a Trial at Law.
(1) An exception in the alleged *modus* that it was not to be paid when the land should be planted with *hops*,
not

CHAPMAN
versus
SMITH,
July 17, 1754.
[*396]
*not fatal on the
face of it in point
of law. (2)*

*mised about a year afterwards; the Rector suffering the issues to be taken against him, *pro confesso*: and no costs were to be paid on either side.
Reg. Lib. 1754. A. fol. 281.

VOL. II.

Page 516.

How *versus* WELDON and EDWARDS,
July 17, 1754.

Assignment of a sailor's share of prize-money at an undervalue, set aside for fraud; but still to stand as a security for what was really advanced. (1)
The same Equity as to an under assignment. (2)

NOTES AND OBSERVATIONS.

(1) SEE *Taylour v. Rochfort*, 2 *Ves.* 281, *et antea* (345).

(2) See 1 *Wils.* 229. and 2 *Woodd.* 388. So a sale of an estate for a great undervalue, with advantage taken of the parties distress, *Wood v. Abrey*, 3 *Madd. R.* 221.

Page 520.

ANONYMOUS (1), July 18, 1754.

NOTES AND OBSERVATIONS.

Publisher of advertisement as to proceedings in Court committed for a contempt (2); but discharged on his submission and full disclosure. (3)

(1) THE name of this case is *Cann v. Cann*, (*Reg. Lib.* 753. *A. fol.* 423). See 2 *Dick.* 795.

(2) Vide (*Roach v. Garran*) 2 *Atk.* 469, and *S. C.* 2 *Dick.* 794; *et ex parte Jones*, 13 *Ves.* 237.

(3) See also 2 *Atk.* 472.

BULLOCK *versus* STONES, July 19, 1754.

(Reg. Lib. 1753. A. fol. 518.)

[397]
VOL. II.

Page 521.

NOTES AND OBSERVATIONS.

AFTER the limitation to the heirs male of *John Stones*, the will proceeded thus:—"and for want of such heirs male to the first son, lawfully begotten, of *Christopher Stones*, and his heirs male for ever; and for want, &c. to the first son of *Francis Stones*, and his heirs for ever."

(1) Vide *Trevanion v. Vivian*, 2 *Ves.* 430-2; *Roper on Legacies*, 205; *Hopkins v. Hopkins*, *Forr.* 44, and 1 *Ves.* 268; *Green v. Ekins*, 2 *Atk.* 473, and 3 *P. W.* 306, note *S. C.* Also *Montgomerie v. Woodley*, 5 *Ves.* 522.

Gore v. Gore, cited p. 522, is in 2 *P. W.* 28 to p. 65, and 2 *Stra.* 958. The Author of these notes particularly desires to refer to the Report in 2 *Strange*, as a supplement to what appears in 2 *P. W.* 65; from whence it appears, that Lord *Talbot*, C. ultimately decreed agreeably to the latter certificate stated in *P. Williams*. The Author is in possession of a MS. case, on the latter events in the case of *Gore v. Gore*, as mentioned 2 *P. W.* 64, which was submitted for the opinion of Mr. *Talbot*, in 1729, somewhat more than four years before his appointment as Lord Chancellor. The Author inserts merely as much of the case as is necessary, but thinks the opinion itself may be rather interesting to the profession.

Devise of real and personal estate to the first son of A. when he shall attain 21, with a direction for his proper maintenance and education. A. having no son at the time of the will, the testator's death, or the Decree; held that the profits of the personal estate should accumulate (1); that as to the real estate, it was a good executory devise, but that the profits thereof descended to the heir until a son should be born, when they should be applied to his maintenance, &c.

Devise of all real and personal estate "in trust"

BULLOCK
versus
STONES,
July 19, 1754.
[*398]

trust" by "B.
C. D." &c. must
be construed by
the subsequent
acts to be done
by them, and
amounted here
to a devise "to
them.

* The case, after stating *the first* certificate, proceeds thus:—Lord C. *King*, * on hearing the " cause, doubted of the opinion, and adjourned it " for further debate ; but before the same came on " again, *T. G.* had a son, who claimed the pre- " mises, both as tenant in tail under the will of " his grandfather, and (his father being dead) as " heir at law ; and also under an agreement. " *Edward Gore*, the testator's second son, died " without issue ; and *William*, the testator's third " son, claimed the said manor under the said will, " and insisted, that being a minor when the said " agreement was made, he was not bound thereby ; " whereupon this further question was stated for " Mr. *Talbot's* opinion."

" *Question.*"

" In whom the freehold vested on the death of " testator, or of *E. G.* his second son ; and in " what manner the son of *T. G.* the eldest son of " the testator, should demand the premises ; whe- " ther under the will of his grandfather, or under " the agreement ?"

" *Opinion.*"

" The first part of the question depends upon " the point which was referred to the Judges, " whose opinion, in question of law, ought to have " some weight. However, *W. G.* the infant son " of *Thomas*, not having been a party to the for- " mer suit, he is not bound thereby, but is at " liberty to bring the same question again in " judgment. The limitation in the will to the " first son of *Thomas*, who was not in *esse* at tes- " tator's death, *if considered as a contingent re-*

* Vide 2 P. W. 64.

" *mairder*,

“ *mainaer, was void, for want of an estate of free-
 “ hold to support it. The objection to it, as an
 “ executory devise, arises from the remoteness of
 “ it, in regard it is limited after a term of 500
 “ years; but that objection does not seem to be
 “ unanswerable. The interest, regarded at com-
 “ mon law, is the *estate of freehold and inherit-*
 “ *ance*; and the chief reason for restraining exe-
 “ cutory devises, to take place in the compass of
 “ some life or lives in being, or in a few months
 “ after, is to prevent the freehold and inheritance
 “ continuing any longer in a state of uncertainty,
 “ and unalienable; but a term for years, how-
 “ soever long, doth not prevent the freehold taking
 “ place in possession *instantly*; though the tenant
 “ of the freehold is not in actual possession of the
 “ land during the term; nor is such freehold in
 “ suspense, or incapable of being alienable. If,
 “ therefore, this opinion was unprejudiced by the
 “ opinion of the Judges, I should incline to think
 “ the limitation to the first son of *T. G.* is good
 “ by way of an executory devise; and his case is
 “ a little stronger in Equity, because the 500 years
 “ term, though *absolute in law, is in Equity to*
 “ *be considered only as a security redeemable;*
 “ and if the limitation to him was good, the free-
 “ hold vested in him the moment he was born,
 “ and his title to the profits accrued from that
 “ time, subject to the incumbrances created by
 “ the will; and clear of all charges brought on the
 “ estate by the agreement, and the order for con-
 “ firming it; which bound the interest of *T.* and
 “ *E. G.* only, and could not bind the infant son
 “ of *T.* who was no party to the agreement.

BULLOCK
 versus
 STONES,
 July 19, 1754.
 [*399]

“ *Charles Talbot, 15th August, 1729.*”

In

BULLOCK
versus
STONES,
July 19, 1754.
[*400]

*In the principal case it was (*inter alia*) declared,
“ that after *John Stones* should have a son born,
“ the said rents and profits ought to be applied
“ for the maintenance and education of such son,
“ till he should attain the age of 21 years.” *R. L.*

VOL. II.

Page 523.

ARCHER *versus* POPE, July 19, 1754.

(Reg. Lib. 1753. A. fol. 528.)

Bond by husband on marriage, reciting agreement to settle wife's estate on the issue, &c. ; the wife not an executing party.— After the marriage a real estate of the wife came into possession.— The husband dies. The wife marries B. and dies; bill by a younger child against B. and the heir of his mother. It seems that the statute of frauds could not have been taken advantage of, on account of the wife not having been an executing party, since the

NOTES AND OBSERVATIONS.

THE devise by the husband was *not absolutely to the wife*, as stated in the report. It appears from *R. L.* that after taking notice in his will, of his having neglected to make such settlement as had been agreed on, he thereby declared that in discharge of the said recited bond he bequeathed to *R. H.* and another, all such share of two freehold messuages as he was entitled to in right of his wife, and his interest in the same, *in trust for her sole use for life*; and afterwards *to the use of his two sons R. A. and the Plaintiff*, and their heirs as tenants in common; and in case they should die before 21, *then* to his said wife, her heirs and assigns for ever, and all the residue, &c.

(2) See *Pawlet v. Delaval*, 2 *Ves.* 663, 671. *Harvey v. Ashley*, 3 *Atk.* 607. *Hargr. Co. Litt.* 37, a. and *Clinton v. Hooper*, 1 *Ves.* jun. 173.

With regard to what Lord *Hardwicke* states, p. 524, of the various informal agreements as to settling property on marriage, see in *Lewis v. Madocks*, 8 *Ves.* 150, which was the case of a bond,

bond, with condition to settle all the personal estate the husband should be possessed of.

As to the law declared by Lord Hardwicke, p. 525, relative to a widow, being bound to forego choses in action, &c. belonging to her, by having taken the benefit of a settlement made upon her marriage *where an infant*, see *Harvey v. Ashley*, 3 *Atk.* 607, with *Hargr. Co. Litt.* 37, *a. note.*

The case of *Felton Harvey*, mentioned in the note to p. 526, is that of *Harvey v. Ashley*, 3 *Atk.* 607.

In the principal case, the declaration of the Court (see page 527) was, that the agreement "ought to be carried into execution against the Defendant *Pope*, and the Defendant *R. A.* the "wife's eldest son, and heir at law." *R. L.*

ARCHER
versus

POPE,

July 19, 1754.

the marriage took place, in consequence of the instrument executed by the husband. Here, however, the wife had proved and acted under her first husband's will, which recited the bond, from whence it was held she had bound herself at all events. (2)

WHITHORN versus HARRIS, July 20, 1754.

(*Reg. Lib.* 1753. *B. fol.* 439.)

VOL. II.

Page 527.

NOTES AND OBSERVATIONS.

(1) SEE *Goodinge v. Goodinge*, 1 *Ves.* 231, &c. *et antea* 122. *Pyot v. Pyot*, 1 *Ves.* 335, *et antea* 161; also *Roper on Legacies*, 115, 116, &c.

Bequest to "near relations," means those within the statute of distributions. (1)

[402]
VOL. II.
Page 528.

CHILLINER *versus* CHILLINER, July 20, 1754.

(Reg. Lib. 1753. A. fol. 452.)

NOTES AND OBSERVATIONS.

Harvey v. Ashley, there cited, is in 3 *Atk.* 607.

Page 530*.
• Note, *The fol.*
edit. is mispaged
from p. 528 to
537.

LODER *versus* LODER, July 22, 1754.

(Reg. Lib. 1753. B. fol. 448.)

NOTES AND OBSERVATIONS.

Portions.
The vesting of,
suspended du-
ring the father's
lifetime.

Graham v. Lord Londonderry, cited p. 531, is
in 3 *Atk.* 393.

Lord Teynham v. Webb, cited *ibid.*, is in 2 *Ves.*
198, *et antea* 325. *Vide* 2 *Ves.* 208, *et antea* 326,
and also *D. Marlborough v. Lord Godolphin*, 2 *Ves.*
61. *et antea* 277.

Page 533.*
* *Mispaged in*
the fol. edit.
Vid. 1 Eden. Ca.
Ch. 1.

BERKLEY *versus* RYDER, *et e Contrà*,
July 22, 1754.

(*Berkley v. Ryves*. Reg. Lib. 1753, A. fol. 561.)

NOTES AND OBSERVATIONS.

Gift on condition
to marry with
consent, where
good, and where
only in terro-
rem. (1)

Pro-

(1) SEE a variety of cases collected in 1 *Roper*
on Legacies, 306 to 332; but more especially
O'Callaghan v. Cooper, 5 *Ves.* 117, and *Stackpole*

v.

* v. *Beaumont*, 3 *Ves.* 89. See also *Dashwood v. Lord Bulkely*, 10 *Ves.* 230, &c. and *Pallock v. Croft*, 1 *Meriv.* 181.

Daley v. Lord Clanrickard, cited p. 535*, is S. C. with *Daley v. Desbouverie*, 2 *Atk.* 261 ; as to which see 10 *Ves.* 241. *Harvey v. Aston*, cited *ibid.*, is in *Com. Rep.* 726, and 1 *Atk.* 361. See Mr. *Sanders's* edition. Et vide *Willes' Rep.* 83 ; also 6 *Ves.* 138, 9.

In the principal case (see the report p. 538), the interest was directed (as there stated) "*from the time of filing the bill.*" *R. L.*

The probability of another bill being filed is alluded to in Mr. *Vesey's* Report. A suit was accordingly instituted, and it came on for hearing before Lord Keeper *Henley*, on the 14 & 15 July, 1757. See a full Report of it from Lord *Henley's* MS. 1 *Eden. Ca. Ch.* 1.

(2) Though the practice, *formerly*, allowed the Defendant to amend his answer, as stated by Lord *Hardwicke*, p. 537 of the report, it has since been very much improved by Lord *Thurlow*, and Lord *Eldon*, C. The one of these Judges introduced, and the other restored a course, for the party to apply to put in a supplemental answer, instead of amending the former one. To obtain such an Order, the party must state by affidavit, that when he put in his answer he did not know the circumstances upon which he makes his application ; nor any other circumstances upon which or in consequence of which he ought to have known the real facts ; see *Jennings v. Merton College*, 8 *Ves.* 79. Per Lord *Eldon*, C. 10 *Ves.* 285, and *Wells v. Wood*, *ibid.* 401.

BERKLEY
versus
RYDER,
et c. contrà,
July 22, 1754.
[*403]

Provision by a brother in favour of sisters, otherwise unprovided for, "upon their marrying with consent," construed as if made by a father. Such a provision, *aliter*, if made by a mere stranger.

Page 537.

Practice.

A defendant having become better apprised of any matters after putting in his answer, cannot contravene or question his own admissions, &c. on the subject by a cross bill.

His proper course is to put the further facts on the record by way of supplemental answer. (2)

Ex

[404]

VOL. II.

Page 538.

*Ex parte DUPLESSIS, July 22, 1754.**(Reg. Lib. 1753. A. fol. 433.)*

NOTES AND OBSERVATIONS.

See this case also 2 *Ves.* 286. 360. 555; also in 1 *Bro. P. C.* 415, octavo edition, and 5 *Bro. P. C.* 91, folio edition.



Page 547:

ATTORNEY GENERAL *versus* BOWLES,
July 24, 1754.

(Reg. Lib. 1753. A. fol. 568.)

NOTES AND OBSERVATIONS.

Lord Hardwicke's opinion, in the latter part of the Judgment, has been over-ruled; and the term "erecting," as applied to charities, is now held to mean the substantial part of the gift, not the mere building of any tenements, &c.

(1)

(1) THE latter point of this principal case, as mentioned in the report, has been *repeatedly over-ruled*; and the modern cases *seem to have established*, that the expressions of "erecting," "building," &c. must be taken *as meaning* that land *is to be bought*, unless the testator *clearly and distinctly indicates* the contrary. See *Ambl.* 616. *Attorney General v. Hyde*, *ibid.* 751, 2, and 1 *Bro.* 444, note. *Attorney General v. Whitchurch*, 3 *Vesey*, 144. *Chapman v. Brown*, 6 *Ves.* 404, &c. et vide *ibid.* 407, 408, &c. See also *Attorney General v. Parsons*, 8 *Ves.* 186. 191.

In the principal case, the Decree, as to the 200*l.* to be laid out, is as follows: "And as to the "legacy of 200*l.*, other part of the said sum of "500*l.*, His Lordship doth Declare, that the same, "or any part thereof, cannot lawfully be laid out
" in

" * in the purchase of ground to build upon ; but
 " that the same may be lawfully laid out in build-
 " ing a school-house, and a house for a school-
 " master, according to the said will, upon any
 " land in the village of N, which now doth, or
 " may, belong to the said parish, and may be ap-
 " plied to that purpose. And it is ordered, that
 " the relators be at liberty to apply to the Court
 " *within two years* from this time for payment of
 " the said sum of 200*l.* and interest, if they shall
 " be able to lay a proposal before the Court ac-
 " cording to the Declaration before mentioned."
Reg. Lib.

ATTORNEY
 GENERAL
versus
 BOWLES,
 July 24, 1754.
 [*405]

HYLTON *versus* HYLTON, July 25, 1754.

(*Reg. Lib.* 1753. *A. fol.* 573.)

VOL. II.
 Page 547.

NOTES AND OBSERVATIONS.

(1) *VIDE* also *Hatch v. Hatch*, 9 *Ves.* 292 ; like-
 wise 3 *Wooddeson*, appendix, and *Cray v. Manfield*,
 1 *Ves.* 379, &c. *Wood v. Davies*, 18 *Ves.* 120.
 326. See also in *Lord Chesterfield v. Janssen*,
 2 *Ves.* 125, *et antea* 297. *Debenham v. Ox*, 1 *Ves.*
 276.

Pierse v. Waring, cited p. 548, is also cited 1
Ves. 380.

As to marriage brocage bonds, noticed p. 549,
 see *Cole v. Gibson*, 1 *Ves.* 503. 506, &c. and
Scribblehill v. Brett, 4 *Bro. P. C.* 144, octavo
 edition, with the notes there.

(2) *Vide* in *Cray v. Manfield*, 1 *Ves.* 379, *et*
antea 167.

Gift of an an-
 nuity soon after
 coming of age
 to trustee, or
 guardian, set
 aside on general
 principles of
 public utility
 (1) ; and here,
 furthermore, on
 particular cir-
 cumstances of
 imposition.
 A person, how-
 ever, may bind
 himself, soon
 after coming of
 age, under pro-
 per circum-
 stances, as if,
 being actually

The in

HYLTON
versus
HYLTON,
July 25, 1754.

[*406]

* The Author of these Notes rather thinks that the course adopted by Sir *J. Strange*, M. R. in *Cray v. Manfield*, would not now be pursued, in a case so circumstanced.

in possession, and *quite sui juris*, he makes such a grant by way of reward. (2)

VOL. II. HAWKINS versus PENFOLD, July 25, 1754.

Page 550.

NOTES AND OBSERVATIONS.

Bankrupt.
A creditor receiving money or bills of exchange after an act of bankruptcy, but without notice of it, was protected in retaining it by stat. 19 Geo. II. c. 32.

(1)

(1) VIDE *Billon v. Hyde*, 1 Ves. 326, et antea 159.

It is to be observed, that the Courts both of Common Law and Equity, felt great difficulty in the determinations upon this statute. See Mr. *Christian's* observations upon it, in his treatise on the Bankrupt Law, 1 vol. p. 597 to 616. The late act of the 46 Geo. 3, ch. 135, has however rendered valid *all* transactions with a bankrupt made *bona fide* two months before the date of the commission; the party not having had notice of any prior act of bankruptcy, insolvency, &c. The subsequent act of the 49 Geo. III. ch. 121. repeals part of the clauses in the former act, which made Striking a Docket, notice of a prior act of bankruptcy.

The act referred to by Lord *Hardwicke*, p. 551 of the report, *as to mutual debts*, is the 5 Geo. II. c. 30. See further as to that point in *Billon v. Hyde*, *ubi supra*.

ATTORNEY GENERAL *versus*
The GOVERNORS of Harrow School (1),
July 26, 1754.

VOL. II.
Page 551.

(Reg. Lib. 1753. A. fol. 481.)

NOTES AND OBSERVATIONS.

(1) VIDE also *Attorney General v. E. of Clarendon*, 17 Ves. 491.

(2) See in the case of *Kirby v. Ravensworth Hospital*, 15 Vesey 305, and in that of *Attorney General v. E. of Clarendon*, *ubi supra*; *et vide antea* 53. 57.

Charity—
Jurisdiction—
Where trustees
of a charity have
discretionary
powers, the
Court will not
interpose un-
less they act cor-

ruptly.—Though it may not chuse to interpose, it does not follow that an information, seeking the Court's interference, will be dismissed; since it may be serviceable to maintain a controul over them.

Where there is, in point of substance, a visitor, it excludes the general interference of the Court, either by commission within the 43 Eliz. or its ordinary jurisdiction. (2)

STACE *versus* MABBOT, July 26, 1754.

[407]
Page 552.

(Reg. Lib. 1753. B. fol. 506.—Reg. Lib. 1755.
B. fol. 149.)

NOTES AND OBSERVATIONS.

(1) VIDE 4 Ves. 206, 207; 9 Ves. 165, 169; 11 Ves. 51; 3 Ves. & Beames, 41, &c. and *Coop. Rep. Ch.* 96.

In the principal case, it appears that the trial did not come on until the sittings after Hilary Term

New trial on
forged instru-
ment.
Courts of Equity
are much less
strict in grant-
ing new trials,
than

STACE
versus
MABBOT,
July 20, 1754.

than Courts of Law; it being necessary, not that the question should be decided to the satisfaction of others, though ever so often, but that the conscience of the Court itself should be quite satisfied. (1)

Term 1756. The jury found upon the several issues, that the bond, and paper writings thereby referred to, *were not* executed by, or of the handwriting of Mr. *Girlington*. And the cause coming on upon the equity reserved, &c. upon the 15th of March following, and no one appearing for the material Defendants, though they had been served, &c. the Court, (*inter alia*) ordered those Defendants to pay the Plaintiffs their costs of the last trial, and restrained them from proceeding at law against the Plaintiff, or Mr. *Girlington's* executors, for any demand upon any of the writings or papers mentioned in the issues; and further ordered, that the said papers and writings, and also all other papers and writings produced before the Master by them, or any of them, in support of their claims, should be detained by the Master in his custody until the further order of the Court. *Reg. Lib. 1755. B. fol. 149.*

[408]
VOL II.

Page 556.

GAGE versus LADY STAFFORD,
July 27, 1754.

(*Reg. Lib. 1753. A. fol. 464.*)

NOTES AND OBSERVATIONS.

As to the Jurisdiction of Foreign Courts.

(1)

A-commission granted to examine at Paris, as to the extent of jurisdiction

of

(1) THE Court in question seems to have been created by an arret of the King of France, and to have been in a degree subversive of the known Courts of ordinary Jurisdiction there. *Vide per Lord Hardwicke on the plea postea.* As to the general doctrine on the sentences of foreign Courts,

Courts, see *Newland v. Horsemen*, 1 *Vern.* 21, and Mr. Raithby's Notes.

In the principal case, the plea mentioned in p. 556 of the Report, as having been over-ruled, &c. was determined about ten years before; and there is a short report of it in 3 *Atk.* 215.

The Author of these Notes being in possession of a manuscript note of Lord Hardwicke's Judgment more at length, thinks its insertion may be acceptable. It is as follows:

GAGE
versus
L. STAFFORD,
July 27, 1764.

[409]

of a particular
Court erected
there; but not
as to the origi-
nal constitution
of it.

GAGE versus BUCKLEY, March 23, 1744.

This bill was brought for an account of the money arising by the sale of several actions of the French East India Company, against the Defendant the representative of Mr. *Cantillon*, who was employed by the Plaintiff, and incited to sell the actions at a particular time, in order to pay some bill of Exchange drawn by Gage the Plaintiff on Mr. *Cantillon*; and the fact alleged by the bill was, that Mr. *Cantillon* had sold the actions before the time directed, at a very high price, and then accounted with the Plaintiff as if they had been sold at the day appointed. To this bill Defendant pleaded two pleas; first, the statute of limitations. Second, a judgment upon the case in a Court of Paris, called the Court of Actions, which Court was a Court of extraordinary Jurisdiction, erected by two arrets of the King to determine suits merely upon questions relating to the negociations of the East India Company's actions, and every thing relating thereto; and in support of this plea, were cited *Barrow v. Gensio*, *Lord King, Mod. Ca. in L. & Eq.* and *Newland v. Horseman*, 1 *Vern.* 21. and S. C. in *Shower v.*

Lord

GAGE
- versus
L. STAFFORD,
July 27, 1754.
[410]

Lord Raymond, and 2 *Ch. Ca.* 74. Several objections were made against the plea. Those which were material will appear by what Lord Chancellor said upon it.

Lord Chancellor.—

Two questions made in respect to this plea :

1st. Whether the subject matter is in itself pleadable ?

2nd. If so, whether properly pleaded ?

As to the first, the general question is, whether the Judgement of a foreign Court can be pleaded in Bar here to relief and discovery ; no case or authority has been cited for this purpose ; and I should be very cautious how I allow it as a precedent, especially of a Court not of established and ordinary jurisdiction, but a special Court, proceeding summarily, and for a particular purpose only.* The Judgment of a Court abroad is evidence of a debt at law ; but if matter of evidence, it could not be pleaded ; and, I think, could not be pleaded at Law.

Judgments of inferior Courts *here* are pleadable, because they derive their jurisdiction from the same source, *viz.* the Crown ; but foreign jurisdictions otherwise.

But it is said, that though it is not-pleadable at law it is so here, because the rule of pleading differs.

But if this is not a bar to an action, there is no reason why it should be a bar in equity, when the demand is for the same thing.

Equitable bars are allowed by reason of a difference of jurisdiction. But though this sentence

* See, however, the observations of Mr. *Beames* in his *Elements of Pleas in Equity*, p. 200, &c.

may

be a defence in equity, and evidence of the right, it would not follow, it can be pleaded; for there are many defences good in equity that cannot be turned into pleas; as length of time, in *many instances*, is not a bar by statute.

GAGE
versus
L. STAFFORD,
July 27, 1754.
[411]

The validity of this sentence depends on many doubtful points of the law of France, which must be made out by future proof.

But suppose such a sentence pleadable, the next question is, whether this is rightly pleaded; and it is objected, that the Court is erected by arret, not registered by the Parliament of Paris, which is necessary.

To this it is said, that there is a general argument of this being according to the laws and constitutions of France. I will not enter into that point at present, but it is certainly an additional argument against this as a plea, that it is the sentence of a Court of *doubtful* jurisdiction in its own country.

I should make great difference between the force of a sentence of a foreign Court of *known and established* jurisdiction, and of *such a Court as this*, erected only by arret, and taking away the jurisdiction of the ordinary Courts of Justice.

Second objection. This does not appear to be a case within the jurisdiction.

I will not give any conclusive opinion upon this; but I doubt much whether the arret extends to deposits and trusts of stock.

Third objection. It is not pleaded that the sentence was pronounced by seven Commissioners, which is the quorum in the arret.

All Judgments here, if pleaded, *must be specially averred to be by such quorum as the law requires.*

GAGE
versus
L. STAFFORD,
July 27, 1764.
[412]

quires. Indeed, in Courts of *ordinary* jurisdiction, it is sufficient to say by the Court, because Courts take notice of their jurisdiction; but it is otherwise of Courts *newly erected, or specially appointed*. I think, therefore, that this is a strong objection.

These objections shew that the most I can do in this case it to allow the plea to stand for an answer, with liberty to except, and save the benefit to the hearing.

This can be no inconvenience, because, if the plea was to be allowed, you must support it by evidence of the law of France; and I believe the Defendant would not be advised to rely singly on that, without going into the merits also.

The laws of foreign countries, if doubtful, may be proved by books, written by their lawyers upon them; or, if there are none, then, by evidence.

Wherefore the Lord Chancellor saved the benefit of the plea to the hearing.

As to the plea of the statute, the case appeared to be, that the Plaintiff was abroad, and had always been so from the time of the transaction.

To this it was objected, that the Plaintiff, to bring himself within the saving of the statute, must return into England. For Plaintiff, was cited contra 2 *Saunders* 220.

This plea over-ruled, with liberty to insist on it at the hearing.

[413]
Practice.
The antient
sum of 40*l.* as
the amount in
which security
must be given
to

SEE the report, page 557; et vide *Ogilvie v. Hearne*, 11 *Ves.* 598, et per Lord *Eldon* C. *ibid.* 600, where his Lordship quite disapproves of Lord *Hardwicke's* inclination, that the infringement of the settled rule should be *discretionary*.

For

For other points, as to the practice of security for costs, vide *Meliorucchy v. The same*, 2 Ves. 24, et antea 260.

GAGE
versus
L. STAFFORD,
July 27, 1754.

to answer costs on the Plaintiff's residing abroad, is not increased under adverse motion on any special circumstances. If, however, such a Plaintiff asks a favour of the Court, further terms may be imposed on him.

HARE versus ROSE, July 27, 1754.

VOL. II.

(Reg. Lib. 1753. A. fol. 444.)

Page 558.

NOTES AND OBSERVATIONS.

(1) THE Order was for a separate report as to the costs, and for payment of them. *Reg. Lib.*

The motion before the Court was to set aside that order for irregularity, and want of notice to the creditors, who had gone in before the Master [as stated in Mr. Vesey's report]; and also that the Master might make a separate report as to debts and legacies.—*The latter part alone* of the motion was granted.

After a Decree for an account in a suit by parties interested in the surplus, where due proceedings take place between the Plaintiffs and Defendants; there is no occasion to give notice to creditors. *Costs* having been given (1) here, in the first instance, they were to be paid before debts, &c.

HAWKINS versus OBEEN, July 27, 1754.

[414]
Page 559.

(Reg. Lib. 1753. A. fol. 310.)

NOTES AND OBSERVATIONS.

(1) SEE the report, p. 560. It appears, however, that in point of fact, a reference had been

Infant trustee.
A Decree having been

HAWKINS
versus
OBEEN,
July 27, 1754.

been made for sale of an estate, and that a trustee should join in the conveyance, that trustee dying, his infant heir bound to execute the conveyance, under the stat. 7 Ann, c. 19.

Such a Decree against the ancestor would obviate any doubt, as to whether his infant heir were or not a trustee within the act.

(1)

Trust estate will pass by a general devise. (2)

[415]

made for the Master to ascertain " whether Obeen " the son, was an infant and trustee within the " statute ;" and that the Master had certified in the affirmative.

The application ought not to have been made by motion, as stated in the report, but upon petition.—That is the only mode directed by the act.

(2) Though the cases appear contradictory, the general rule seems to be, that a trust estate will pass by a devise in mere general terms, unless an intention to the contrary can be inferred, either from expressions in the will, or from objects of probable convenience. See *Lord Braybrooke v. Inskip*, 8 Ves. 417. 432, 434, &c. The proposition stated therefore in *Attorney General v. Buller*, 5 Ves. 339, 340, is, in fact, over-ruled. The Court, indeed, seems to have looked so much at the quantum of convenience in each particular case as to have rendered the last-mentioned rule of trust estates passing by a mere naked devise, of very little use ; see *ex parte Sergison*, 4 Ves. 147. *Ex parte Brettell*, 6 Ves. 577 ; and *Lord Braybrook v. Inskip*, *ubi supra passim*. Lord Eldon, C. says in *Lord Braybrook v. Inskip*, that the rule is not that in every question as to the devise of a trust estate, where general words are used, the property shall, or shall not, pass by them, but that in each case the Court will look at every part of the will for the probable intention, 8 Ves. 436.

SLEECH *versus* THORINGTON, July 29, 1754.

VOL. II.

(Reg. Lib. 1753. B. fol. 507, entered "*Sleech v. Hatch.*")

Page 560.

NOTES AND OBSERVATIONS.

(1) UPON these questions relative to legacies of stock, see 1 *Roper on Legacies*, 17, &c. and 24.

(2) See 1 *Roper on Legacies*, 114.

(3) See pp. 561, 562; et vide *Wright v. Morley*, 11 *Ves.* 12; *Watkins v. Watkins*, cited p. 562, is in 2 *Atk.* 96, 98. See also *Atherton v. Nowell*, 1 *Cox. Ch. Ca.* 229.

Perse v. Snaplin, cited *ibid.* is also cited 1 *Ves.* 424, and is rep. 1 *Atk.* 414.

The case of *Coventry v. Carew*, cited p. 564, is in 2 *Atk.* 366.

Tomkins v. Tomkins, cited at the bottom of p. 564, is in 3 *Atk.* 257. See also *Stebbing v. Walker*, 2 *Bro.* 83; and *Hampshire v. Pearce*, 2 *Ves.* 216.

quests clearly specific; and having only one East India bond at her death.

Bequest of South Sea Stock, in parcels, to a larger amount than testatrix was possessed of, held specific, the bequest of the last parcel being called "*the remaining S. S. stock standing in her name.*"

These legatees must abate in proportion *inter se*.

Bequest "to the two servants that should live with testatrix at her death;" she had three at that time, and all of them were held entitled. (2)

Baron and Feme.—Husband suing for the wife's property, must make a settlement. If he is out of the jurisdiction, or otherwise leaves his wife unprovided for, the Court will order payment of the interest to the wife, till he returns and maintains her properly. (3)

Will, construction as to legacies specific and otherwise. (1) Bequest "of 400*l.* East India bonds," under the circumstances not specific; but a legacy of quantity, to be made good out of the general assets; the testatrix having repeatedly, in this bequest, omitted the word "my," which she had used in other be-

[416]
VOL. II.
Page 568.

PITT *versus* CHOLMONDELEY, July 30, 1754.

(Reg. Lib. 1753. B. fol. 448.)

NOTES AND OBSERVATIONS.

Account.—
Difference between where there is an open general account, and where a party has leave given only to surcharge and falsify. In the latter case the burthen of

(1) SEE *Townsend v. Lowfield*, 1 *Ves.* 35, 37, *et antea* 31. Et vide *Sewell v. Bridge*, 1 *Ves.* 297, *antea* 152; and *E. Pomfret v. L. Windsor*, *antea* 390.

proof lies on the party having such liberty. (1) The Court will, however, admit a greater latitude in cases of surcharge, &c. as between guardian and ward, and others, where one party is conussant of the accounts, and the other is not, than it allows where the parties are on equal terms.

As to Lord *Hardwicke's* reference in p. 567, of the Rep. to the years 1720 and 1721, the allusion is to the state of things before the passing of Sir *J. Barnard's* Act against Stock-jobbing; viz. Stat. 7 Geo. II. ch. 8.

Page 568.

HUCKS *versus* HUCKS, July 31, 1754.

(Reg. Lib. 1753. A. fol. 482.)

NOTES AND OBSERVATIONS.

Sir Thomas
Clarke, M. R.
His honour de-
[417]
cided that under a limitation by marriage articles for the first son, and the first son of such first son, the former could not be restricted

(1) THE law now seems contrary to the decision of the Master of the Rolls in the principal case; and that *an unborn son may take an estate for life, either through the medium of a power, or by an express use.* See *Routledge v. Dorrell*, 2 *Ves. jun.* 357, 366; and *Fearne, Ex. Dev.* 325 with Mr. *Powell's* notes.

(2) The Court declared, "that the lands purchased
" chased

"chased by the father, and left to descend to the Plaintiff, ought to be deemed as part performance and satisfaction of the articles, in case the Plaintiff, the son, had accepted those lands, so descended; but he declining to accept those lands," a sum, ascertained by the Master, was ordered to be laid out in a purchase of lands, to be settled; and the Plaintiff was directed to convey the lands descended.

(3) The Plaintiff's father had, by his will, directed lands of the above value to be purchased, and (*inter alia*) settled on the Plaintiff for life; and had made several bequests in his favour. The Plaintiff was put to his election, and chose to take under the articles. *Reg. Lib.*

HUCKS
versus
HUCKS,
July 31, 1754.

stricted to a life estate, or take less than an estate tail; but the law seems contra now. (1) Land purchased and suffered to descend, decreed to be taken as a part performance and satisfaction of the marriage articles. (2) Election. (3)

ELLISON versus AIREY, August 1, 1754.

(*Reg. Lib.* 1753. A. fol. 543.)

VOL. II.

Page 568.

NOTES AND OBSERVATIONS.

(1) SEE the case of *E. of Godolphin v. Penneck*, 2 Ves. 271, 272, et antea 341.

As to Lord Warrington's case, cited p. 569 of the Report, see the note to *E. of Godolphin v. Penneck*, antea 341.

The Rep. of that case is 1 Bro. P. C. 511, octavo edition; and 4 Bro. P. C. 90, of the folio edition.

S. C. antea 73.

Charge by will of the whole real estate in aid of personal for debts and legacies, not re-

[418]
strained by the subsequent devise of a particular part for that purpose, without negative words. (1)

VOL. II. WOFFINGTON *versus* SPARKS, Aug. 2, 1754.

Page 569.

(No Entry.)

NOTES AND OBSERVATIONS.

Bonds.— (1) VIDE *Gammon v. Stone*, 1 *Ves.* 339, *et*
 Assignment of bond to co- *antea* 162.
 obligor, who
 pays it, is of no use; since even the principal may plead payment to an action
 in the name of the obligee. (1) Action, however, lies on the case, and perhaps
indebitatus assumpsit.

Page 571. WORTLEY *versus* BIRKHEAD, Aug. 3, 1754.

(Reg. Lib. 1753. B. fol. 446.)

NOTES AND OBSERVATIONS.

Mortgage.— (1) See in the *E. of Portsmouth v. Lord Ef-*
 Tacking.— *ingham*, 1 *Ves.* 430, 435, *et antea*. Et vide
 A third incum- *Mitford Pl.* 78; and *Cole v. Gibson*, 1 *Ves.* 504,
 brancer may, *et antea* 211. Vide also *Beames's Ord.* Ch. 1 and 2.
pendente lite,
and before a de-
cree, gain a
 priority over the second, by taking in the first. Such thing, however, not
 allowed after a Decree settling the priorities. Demurrer allowed on the latter
 ground. Bill of review on new matter must be on leave of the Court and affi-
 davit, shewing the party's right; that it was not known to him at the time of the
 Decree, or since such other time as he could have used it for his advantage in the
 former cause. (1)

KINSEY *versus* KINSEY, Aug. 3, 1754.

(Reg. Lib. 1753. A. fol. 386.)

[419]
VOL. II.

Page 577.
S. C. 3 Atk. 809.

A Decree cannot be pleaded, unless it has been signed and enrolled.

Ex parte HIGHAM, August 8, 1754.

Page 579.

NOTES AND OBSERVATIONS.

This decision seems preferable to that of the Master of the Rolls in *Willats v. Cay*, 2 Atk. 67, where the whole was suffered to be paid to the husband, though he was insolvent. In later cases, however, the Court seems to have considered itself bound, if the wife pressed it. *Dimmock v. Atkinson*, 3 Bro. 195; 2 Ves. jun. 677; and 10 Ves. 88. See also the note on *ex parte Gardner* (2 Ves. 671, 672), *postea*, 438.

Baron and Feme. The Court refused to let the whole of a wife's fortune be paid to her husband, although she was present in Court, and consented to it.

KEMP *versus* MACKRELL, Aug. 8, 1754.

Page 579.

(Reg. Lib. 1753. A. fol. 495.)

NOTES AND OBSERVATIONS.

(1) VIDE *White v. Hayward*, 2 Ves. 461-2, and the notes thereon, *antea* (385); also *Johnson v. Peck*, 2 Ves. 465, *et postea* 386.

(2) S. C. on this point only 3 Atk. 812.

Parties resting their defence in an issue at law upon instruments ascertained at the

trial to be forged, will not be allowed to enter into any other evidence; or to say the forged instruments were immaterial. Though, generally speaking, costs dic

die with the party, if they have not been taxed (1); several exceptions are allowed to it; and revivor may be for costs alone, under particular circumstances (2).

[420]
VOL. II.

Page 582.

TUDOR *versus* ANSON, August 9, 1754.

(Reg. Lib. 1753. B. fol. 309).

NOTES AND OBSERVATIONS.

A defect of a surrender of copyholds, &c. is supplied in favour of a widow, children, &c. without any statement that they are left unprovided for; but it is not supplied in favour of grand-children.

It is supplied in favour of creditors, where no other real estate, under a general devise, after a direction to pay debts. (1)

Necessity of surrenders now dispensed with by stat. 55 Geo. 3. c. 192.

(1) VIDE *S. P. Ithell v. Beane*, 1 *Ves.* 215, *et antea* 114. See also particularly *Byas v. Byas*, 2 *Ves.* 164, *et antea* (315); which (*inter alia*) refers to *Scriven on Copyholds*, 134, 135-6, &c. *Ibid.* 162-3, &c. *Quod vide.*

It is to be observed that a considerable alteration has been lately made in the law relative to copyholds by the Statute 55 Geo. 3, ch. 192, which dispenses with the necessity of a surrender in respect of all testators dying after the passing of that act, upon payment, by the persons intitled or claiming, of all duties, fees, &c. that would have been due and payable in case a surrender had been made. It is also to be noticed that *it seems most advisable* to surrender to the use of the will in every case where it can be done, notwithstanding the benefit of the act.

For some useful observations on this statute see Mr. *Scriven's* work on Copyholds, &c. 1 vol. 267, *et seq.*

EARL OF BATH *versus* EARL OF BRADFORD,
October 26, 1744.

VOL. II.

Page 587.

(Reg. Lib. 1753. A. fol. 516.)

NOTES AND OBSERVATIONS.

Carr v. Lady Burlington, 1 P. W. 229; and *Maxwell v. Wettenhall*, are the cases alluded to by Lord Hardwicke, page 588 of the Report, as cited at the Bar.

With regard to his Lordship's particular observations on *Maxwell v. Wettenhall*, see Mr. Cox's note, 2 P. W. 26. It appears from Reg. Lib. relative to it, that interest was *not* directed as to any simple contract debts; that the question was "whether *any* interest," and from what time, should be paid for certain legacies, *insisted upon* as charged on the real estate. *The whole report, therefore, of that case in P. W. is manifestly incorrect*, and at variance with the most acknowledged authorities on various points. See Mr. Cox's note.

As to various points in respect of interest, as given in the Courts of Law and of Equity, see *Barwell v. Parker*, 2 Ves. 363, *et antea*. *Lloyd v. Williams* (cited also in the Rep. p. 588), 2 Atk. 108; *Creuze v. Hunter*, 4 Bro. 321; and the note to 2 Ves. jun. 169; together with *Sitwell v. Bernard*, 6 Ves. 520, and *Scho. and Lefr. Rep.* 11.

ing for a Decree [No suit being instituted]. There is a *difference*, in consideration of law and the strict rules of the Court, as to the case of a *lunatic* being let in to take exceptions to a Master's report after its being confirmed, *and that of an infant*; but it is equally open to the discretion of the Court in either case.

TOMKYNs

Interest.—
Lessor cove-
nants for quiet
enjoyment, and
devises his estate
in trust to pay
debts. Lessees,
being evicted,
recover against
his executors,
[421]
and assign the
judgment.
This is a debt
by specialty, and
the assignees
are entitled to
interest.
Devise in trust
to pay debts is
not within the
statute of frau-
dulent devises.
S.P. 1 Bro.
311. Vide
also Mr. San-
ders' note to
*Plunkett v. Pen-
son*, 2 Atk. 202.
Trustees to pay
debts may fairly
raise by sale or
mortgage,
without wait-

VOL. II. TOMKYNs *versus* LADBROKE, June 27, 1755.
 Page 591. (Reg. Lib. 1754. B. fol. 294.)

NOTES AND OBSERVATIONS.

Custom of London.—

Orphanage part—

A freeman, on the same day with his will, by

[422]

deed assigns part of his personal estate in trust to separate use of his daughter (1). He was

then aged seventy-two; in the gout; and died in two days: the daughter had been married without consent; but he was reconciled. Held to be a testamentary disposition, in fraud of the custom, and that it might

be disputed by the daughter's husband. Gift of personalty by freeman may be in lifetime, or in *extremis*, if he divests himself of the property, and it is enjoyed accordingly (1); and if clearly not a testamentary act, in fraud of the custom. (2)

Though a settlement be made on a wife before marriage, if a great accession of fortune happen to the wife afterwards, the Court will direct a further settlement out of it, when it once obtains jurisdiction. (3)

(1) He did not deliver over the security. See *Antrobus v. Smith*, 12 *Ves.* 39. See also *Ward v. Turner*, 2 *Ves.* 431, *et antea* 378.

See also Lord *Ellon*, C.'s observations on most of the cases, 8 *Ves.* 154, &c.

(2) Besides the cases in the preceding note, and as to cases in *fraud of covenants*, see *Randall v. Willis*, 5 *Ves.* 262, &c.; *Jones v. Martin*, 3 *Anstruther*, 890; but much more fully 5 *Ves.* 266, note.

Hancock v. Hancock, cited p. 592 of the Rep. is in 2 *Vern.* 665. The point there mentioned seems now perfectly settled; namely, that where the widow of a freeman was barred before marriage of her customary part, and such freeman died, leaving a child, the orphanage part was a moiety, and not a third. See Mr. *Raithby's* note to *Lowe v. Chadwick*, 1 *Vernon* 6.

(3) See page 595 of the Report; *et vide* *Stackdole v. Beaumont*, 3 *Ves.* 89.

MOORE *versus* MOORE.
June 28 [and July 8], 1755.
(Reg. Lib. 1754. B. fol. 355.)



VOL. II.

Page 596.

S. C. 1 Dick. 60.

NOTES AND OBSERVATIONS.

VIDE page 597 of the Report. That a *debtor* to a testator's estate may be called to account in Equity under *particular circumstances*, such as the insolvency or collusion of the executor, see *Alsager v. Rowley*, 6 *Ves.* 748.

The order alluded to by Lord *Hardwicke* at the bottom of p. 597, was in 1741, and is stated 2 *Ath.* 139. See also Mr. *Beames's* very complete and valuable edition of the Orders in Chancery, 366, and the notes.

With regard to what follows at the top of page 598, vide the cases cited *antea*, in that of *Cole v. Gibson*, p. 211, and see Mr. *Beames's* Orders in Chancery, 366, 367, note.

(1) The third edition of Mr. *Vesey's* Reports notices, that a custom to bar by surrender *may be concurrent* with a custom to bar by recovery; and it cites *Everall v. Smalley*, 2 *Str.* 1197; and *Doe. dem. Wightwick v. Truby*, 2 *Black. Rep.* 944. And it also observes, that in 3 *P. W.* 10, Lord *Macclesfield* said, the only *proper way* of barring the intail of a copyhold, was by recovery in the Lord's Court.

(2) See the Report, page 600; et vide *Orr v. Kames*, 2 *Ves.* 194, et *antea* 324. See also *Walcot v. Hall*, 2 *Bro.* 305, and 1 *P. W.* 495, *fifth edition*, S. C.

Supplemental bill, in nature of a bill of review, must be accompanied with a petition to rehear or appeal.

[423]
Account.—
Though every trustee of part of the personal estate is not to be called to account by a particular pecuniary legatee, but only by the executor or administrator, and though such trustee who receives the trust money, and thereby becomes a debtor, is not to be considered and chargeable as executor, merely because he is so named in a will, yet where he is made a co-executor, and does not renounce, whilst he receives the trust

trust money, he is properly made a Defendant to a suit for a general account, and is accountable therein for his receipts ; and *this*, the more especially, since his being named executor is a release of the debt at law.

Copyholds.—Intail of copyholds barred by a mere surrender to the use of a will, &c. *where no peculiar custom* shewing the necessity of harring by recovery. (1)

To shew a customary estate tail it is necessary to shew remainders, or such long enjoyment according to the limitation, as to *exclude the supposition of a conditional fee*.

As to whether residuary legatees, paid by executor, shall refund to legatees who were not paid immediately. (2)

Rule as to strict bills of review, is that the Decree can be varied only upon errors complained of ; except as to matters merely consequential upon the variation made. Same rule as to appeals in the House of Lords.

[424]
VOL. II.

Page 610.

SOUTHBY *versus* STONEHOUSE,

June 30, 1755.

(Reg. Lib. 1754. B. fol. 402.)

NOTES AND OBSERVATIONS.

Feme Covert by will pursuant to power (1) leaves to her husband "all the profits and revenues of my estate of A. and B. for life, and after his death, my said estates to my children, if I should leave any to survive me ; but if I should leave no such child or children, nor the issue of such, the said estates to I. H. ; making

(1) See the Rep, page 612; et vide 2 *Wooddeson*, 345 ; 2 *P. W.* 624 ; 1 *Ves.* 139 ; and 2 *Ves.* 75. Et vide the notes to the *D. Marlborough v. E. Godolphin*, *antea* 277.

(2) See 2 *Wooddes.* 344 ; 1 *Sid.* 148 ; 1 *Eq. Ca. Ab.* 188 ; and 2 *Stra.* 1125. Et vide *Elton v. Eason*, 19 *Ves.* 73. 79. 80.

The case of the *D. Marlborough v. L. Carlisle*, mentioned at the bottom of page 612, is that of the *D. of Marlborough v. Lord Godolphin*, 2 *Ves.* 61. *Quod vide.*

See *Elton v. Eason*, 19 *Ves.* 73. 79. 80.

(3) See the Rep. p. 614 ; likewise *Goodwyn v. Goodwyn*, 1 *Ves.* 226, and the note thereon, *antea* 117. Et vide 2 *Cox. P. W.* 524, 525, note. See likewise *Bailis v. Gale*, 2 *Ves.* 48, and the note on it, *antea* 268.

"making him sole heir in default of issue, and after the death of my husband." *The children take an estate tail; not fee simple; and the remainder to I. H. is good; not a contingent executory limitation on her dying without children living at her death, but a general dying without issue.* (2)

A devise of a testator's "*estate at A.*" without more, will comprehend his *whole interest* in the lands, *rather than* be referable to the mere locality. (3)

If, however, words of limitation be added, they will determine the extent of the benefit.

CLARK *versus* GUISE, July 1, 1755.

(Reg. Lib. 1754. A. fol. 502.)

[425]

VOL. II.

Page 617.

NOTES AND OBSERVATIONS.

(1) THE Master of the Rolls observes, p. 618 of the Report, that this case fell within the principle of *Milner v. Milner*, 1 *Ves.* 106, where the Court rectified the testator's miscomputation.

So likewise if a testator directs payment of *any larger certain sum mentioned to be due from him, than is the fact*, the whole sum will be decreed. *Whitfield v. Clement*, 1 *Merivale Rep.* 402.

The Master of the Rolls there refers the principle in such instances to the civil law, observing "*falsd demonstratione legatum non perimi*;" the note whereon has (*inter alia*) the following extract applicable to the above points:—*Quotiescunque ulla ratione major utilitas redundat in Creditorem, toties subsistit debitum creditori legatum. Redundat autem major utilitas vel ratione quantitatis, vel,*" &c. See pp. 404-5. See also *Barret v. Beckford*, 1 *Ves.* 519, *et antea* 219.

In the principal case the Court declared, "that the Plaintiff was not obliged to accept of the sum

Sir Thomas Clarke, Master of the Rolls for the Lord Chancellor.

A testator, reciting the amount of a debt he owed A. according to his own computation of it, directs such amount to be paid out of his real and personal estate; and bequeaths an annuity to A. for life, out of his real and personal estate. Such creditor may enjoy the annuity, and be at liberty to dispute the testator's calculation of the debt. (1)

of

CLARK
versus
GUISE,
July 1, 1755.

[426]

“ of 500*l.* as the whole of the debt to be paid her
“ out of the assets of the said testator ; but that
“ she was entitled to the whole of what should be
“ found due to her, according to the directions
“ therein-after mentioned ; together with the an-
“ nuity of 50*l. per annum*, &c. These were, for
“ the Master to take an account of what was due
“ to her for the principal of the said sum of 680*l.*
“ 2*s.* 4*d.* being the amount of a bill of exchange
“ given her by the testator [and referred to in his
“ will], with interest from the date of it : and he
“ was to take an account of what was due to her
“ for any other sums of money disbursed by her
“ on account of the testator since that time ; and
“ also of the arrears of the annuity.” *R. L.*

VOL. II.

Page 619.

FLIGHT *versus* COOK, July 1, 1755.

(*Reg. Lib.* 1754. *A. fol.* 576.)

NOTES AND OBSERVATIONS.

Bill *quia timet.*
A. having dis-
posed of part of
a specific sum,
which he had covenanted should be paid to B. on a contingency, decreed to secure it.

THE case of *Lord Warrington v. Langham*,
cited in the Report, p. 620, is in *Prec. Ch.* 89.

which he had covenanted should be paid to B. on a contingency, decreed to secure it.

ANONYMOUS,

ANONYMOUS, July 3, 1755.

VOL. II.

NOTES AND OBSERVATIONS.

Page 620.

(1) SEE the Report, p. 621. An Injunction, however, will be extended to stay trial, *on a slight* affidavit. Vide 13 *Ves.* 323, 324. All that is *necessary* to be stated in the affidavit to ground a motion for the purpose is *merely in general terms*, that the party cannot safely proceed to trial, until the answer is put in. See 2 *Dick.* 728, 729; 13 *Ves.* 323; and 2 *Ves.* and *B.* 41. Injunction extended to stay trial (1) in actions by a corporation for petty customs. [427]

A party cannot, in the Court of Chancery, have an Injunction to stay a trial in the first instance, and must obtain the common Injunction first. See 10 *Ves.* 450. It seems also that he cannot obtain it on the same day. Ibid.

See the Rep. p. 621. A bill lies for an account of tolls after an establishment of the right at law. Vide *Corporation of Carlisle v. Wilson*, and the cases there cited, 13 *Ves.* 276. Bill for account of tolls.

WALKER versus PRESWICK, July 5, 1755. Page 622.

(Reg. Lib. 1754. B. fol. 347.)

NOTES AND OBSERVATIONS.

(1) VIDE 1 *Vern.* 267; 2 *Vern.* 281; with Mr. Raithby's notes. See also 3 *Atk.* 273; 6 *Ves.* 475 and 752. But more especially Mr. Sudgen's most valuable work on Vendors and Purchasers. In the principal case the Bill, which was mere- Lien.— Bill of sale of a ship assigns the property. The contractor, who

WALKER
versus
PRESWICK,
July 5, 1755.

who had been only paid half of the expences of the building, having thereby the legal and equitable interest, is entitled

[428]

to be paid his whole demand; and the parties interested, or their estates, must settle their proportions and rights between themselves.

Parties.—

As to the lien of a vendor of real estate for the purchase money. (1)

ly against *Preswick*, and the representatives of *Lacey*, prayed that the defendants might satisfy the Plaintiff out of the produce of *Lacey's* moiety; and in case such moiety should not appear to have been already really and fairly sold by *Preswick*, that he might, if there should be occasion, join in a sale, &c.: and that for the more effectual payment, &c. if occasion should be, *Preswick* might pay the balance due from him on account of the ship, upon the stated account mentioned in the Bill. *Preswick* stated, in his answer, that he sold the ship in 1752 to *R. Sollitt* for 1240*l.* and that he received such sum, and in consideration of it executed a general bill of sale of the ship, in common form, to the said *R. S.* He submitted to the Court, whether, as the Plaintiff delivered up the ship to *Lacey*, and accepted of the bills of exchange from him for his part or share, such half part of the ship was, at the time of *Lacey's* death, or of *Lacey's* sale thereof to him, the Defendant, specifically liable to the payment or satisfaction of the Plaintiff's demands; and insisted, that he having purchased such moiety for a full and valuable consideration, really paid by him, ought not to be obliged to pay the Plaintiff's demands, or any part thereof; but that the same ought to be paid by the executors of *Lacey*, who received the purchase-money for such moiety from him, the Defendant. It is observable, that *R. Sollitt*, the assignee from *Preswick* of his whole interest in the ship, was not made a party to the suit. The Decree directed an account of what was due to the Plaintiff, with interest at five per cent.; and that *Preswick* should pay the amount, "so as the same did not exceed the sum of 620*l.*" "being

"being one moiety of the purchase-money for
"which he sold the said ship; together with the
"Plaintiff's costs of the suit, &c." And in case
Preswick should do so, then *Lacey's* representa-
tives were to reimburse and pay him so much as
he should have paid for principal and interest;
and also one moiety of the costs out of *Lacey's*
assets, &c. &c.

WALKER,
versus
PRESWICK,
July 5, 1755.

DRINKWATER *versus* FALCONER,
July 8, 1755.

(Reg. Lib. 1754. A. fol. 573.)

[429]
VOL II.
Page 623.

NOTES AND OBSERVATIONS.

The case of *Carew v. Carew*, cited p. 625 of
the Report, is also cited in the same vol. p. 564.
It is rep. 2 *Atk.* 366.

(1) The Court (*inter alia*) declared, "that
"the Defendant *T. Bowe*, was entitled to the
"450*l.* *S. S. Annuities*; together with the sum of
"38*l.* 15*s.* in the hands of *Fisher*; which annui-
"ties and money were the produce of the note for
"500*l.* specifically bequeathed to him by the co-
"dici*l* of the said testatrix."

Legacies.—
Specific legacy
if existing, the
whole paid,
though nothing
left for pecu-
niary; but if
not existing, the
right is gone.
A debt specif-
ically bequeath-
ed, and after-
wards volun-
tarily paid in,
no ademption

of the legacy; if a compulsory payment, it may or may not be an ademption,
according to circumstances; for if a particular reason is given, or if replaced
on same fund, or so ordered, it is no ademption.

Bequest of a note for 500*l.* "in the hands of *F.*;" when *F.* had laid it out in
stock unknown to testatrix. Though the bequest of the note is specific, the
legatee shall have the stock in which it is vested, (1)

VOL. II. BRIDGMAN *versus* GREEN, July 9, 1755.

Page 627.

(Reg. Lib. 1754. A. fol. 548.)

NOTES AND OBSERVATIONS.

This Decree was afterwards affirmed on a re-

[430]

hearing.

See Lord C. J.

Wilmot's cases

and opinions;

&c.p. 58, &c.

Relief against

deeds obtained

by fraud and im-

position. (1)

Conveyance for consideration not afterwards to be set up as a gift; and being for fictitious consideration, inserted by the grantee himself, though found a gift by a jury, set aside in equity. (2)

Interest obtained through fraud cannot be maintained by third persons, though not themselves parties to the imposition. (3)

(1) SEE this case on the re-hearing; Lord C. J. *Wilmot's* cases and opinions, 58: likewise *Nantes v. Corrock*, 9 *Ves.* 182; *Hatch v. Hatch*, *ibid.* 292; and *Huguenin v. Baseley*, 14 *Ves.* 273, with the cases referred to.

(2) VIDE *Clarkson v. Hamway*, 2 *P. W.* 203.

(3) See the principal case, *Wilm.* 64, and that case as enforced by Lord *Eldon*, C. 14 *Ves.* 289.

Page 629.

ANONYMOUS, July 9, 1754.

Rolls.

NOTES AND OBSERVATIONS.

Though the Court decreed specific performance of an agreement to let the Plaintiff into a trade, it refused to direct an account of the profits, from the time the Plaintiff ought to have

been admitted; his remedy for that having been at law. (1)

Where a trustee has an infant's money to lay out for his benefit, and employs it in his trade, the Court will give an option for the benefit of the infant, either to have interest, or the profits of the trade. (2)

(I) Query, whether, as the Court saw reason for its interference, it ought not to have directed an account or an issue quantum damnificatus, at the least? Et vide in *Graham v. Graham*, 1 *Ves.* 262, *et antea* 134.

(2) *Dictum.* See the Rep. p. 630. Et vide accordingly *Raphael v. Boehm*, 11 *Ves.* 92; 13 *Ves.* 413 and 590.

ANONYMOUS, July 12, 1755.

[431]

VOL. II.

NOTES AND OBSERVATIONS.

Page 630.

WITH reference to what Lord *Hardwicke* says, Injunction. page 630 of the Report, that it is a motion of course to proceed to make bail at law liable, notwithstanding an injunction, the profession in general should be aware of the boundaries and distinctions of practice, as exemplified in the case of *Bullen v. Ovey*, 16 *Vesey* 141. A party was there held to have committed a breach of an Injunction by having ruled the sheriff to bring in the body, where the bail, after having been excepted to, had not been justified agreeably to notice. The effect of an injunction, in the Court of Chancery, is there clearly distinguished.

Before an action commenced (by the delivery of a declaration), it stays *all process*; after action commenced, it allows the defendant to call for a plea, and proceed to judgment, if in a condition to do so. See also 18 *Ves.* 488.

ANONYMOUS, July 12, 1755.

Page. 631.

NOTES AND OBSERVATIONS.

(1) SEE *Fenhoulet v. Passavant*, 2 *Ves.* 24, et ante 260; *Coffin v. Cooper*, 6 *Ves.* 514. *Anon.* 5 *Ves.* 656, &c. Any record of the Court may be referred for scandal at any time;

(2) The

ANONYMOUS,
July 12, 1755.

[432]

time ; [and even by strangers to the suit ;] (1) but it is otherwise as to a reference for impertinence.

Though such orders are discretionary to a certain extent, the opportunity may be lost or waived. (2)

(2) The third edition takes notice, that Lord *Thurlow*, C. seemed to disapprove of Lord *Hardwicke's* decision and observations in the principal case ; referring to *Kimworthy v. Allen*, 1 *Bro.* 400. See nevertheless 5 *Ves.* 656 ; and *Pellew v.* — 6 *Ves.* 456.

With regard to what Lord *Hardwicke* says in the Report, as to two terms being allowed to file exceptions, it is *now settled*, that a Plaintiff has two terms and one vacation, on application to file them *nunc pro tunc*.

VOL. II.

Page 631
and 638.

HINTON *versus* HINTON, July 14, 1755.

(No Entry.)

NOTES AND OBSERVATIONS.

A copyholder contracts, for valuable consideration, to sell his copyhold lands to his son, but dies before an actual sur-

render ; the son held entitled to have the agreement fulfilled, and to a surrender from the widow of her free-bench. (1)

Assignees of a bankrupt take the property subject to all equities affecting the bankrupt. (2)

- (1) *S. P. Browne v. Raindle*, 3 *Ves.* 256.
(2) See the Rep. p. 633 ; et vide 13 *Ves.* 188. *Carr v. Singer*, mentioned p. 639 of the Report, is in 2 *Ves.* 603. *Moor v. Moor*, cited *ibid.* is in 2 *Ves.* 596, et *antea* 422.

MATHEWS *versus* MATHEWS, June 15, 1755.

(Reg. Lib. 1754. B. fol. 452.)

[433]
VOL. II.
Page 635.

NOTES AND OBSERVATIONS.

(1) [To cause a legacy to be a satisfaction for a debt, it must be exactly of the same nature and certainty ; and an apparent intention of the testator ought to appear. *Prec. Chan.* 394: 1 *Wms.* 408 ; 2 *Wms.* 553, 616, 1 vol. 521, 126 ; 2 *Atk.* 300 ; Vide 3 *Wms.* 227, where the Master of the Rolls said, if testator intended a legacy as a satisfaction of a debt, he would have taken notice of it ; and cited a decree of Lord *Harcourt's* in *Salk.* 508, for that purpose. Vide 1 *Wms.* 410, note, fourth edition, where the cases on this subject are collected.] *Note to the third edition.*

(2) See *Richardson v. Elphinstone*, 2 *Ves.* jun. 463 ; *Tolson v. Collins*, 4 *Ves.* 483 ; and *Hinchcliffe v. Hinchcliffe*, 3 *Ves.* 516 ; with the observations on it, 6 *Ves.* 325, 398, 400, 402.

In the principal case the Court (*inter alia*) declared, that the annuity of 700*l.* a year, devised to T. M. the son, was to be deemed a satisfaction of what he was entitled to under the agreement of 1733. And also, that the deed of 1750, being subsequent in time to the will of the testator, was to be considered as a new agreement between the father and son, and amounting to a release of the condition concerning Mrs. *Burgess's* annuity, annexed by the said will to the devise of the said 700*l.* a year. *R. L.*

A debtor bequeaths a much larger legacy, upon a condition, which by a subsequent deed, it becomes impossible to perform ; by the will it would not have been a satisfaction, as it was for another purpose ; but being freed from the condition by the deed, it is a satisfaction. (1) General rule that a legacy larger than, or equal to, a debt, is a constructive satisfaction ; but any minute circumstance is laid hold of to take it out of that rule. (2)

ALEXANDER

[434]
VOL. II.
Page 640.

ALEXANDER *versus* ALEXANDER,
July 17, 1755.

(Reg. Lib. 1754. A. fol. 561.)

NOTES AND OBSERVATIONS.

Power to appoint among children ; (1) each must have a part, not illusory, (2) nor reversionary ; but a particular interest, as for life, may be given to one. Such a power will not extend to grand-children ; (3) nor can a discretion be given to another to ap-

point. But though that would be void, it would not devolve on the Court ; which is only where the power is well created, but by accident cannot be executed by the party. (4)

Where given to those *not capable, together with another, who is capable*, the latter will take the whole. Under such a power it cannot be given free from debts of the appointee.

(1) SEE *Maddison v. Andrew*, 1 *Ves.* 57, 59 ; *et antea* 45, 46 : more especially *Kemp v. Kemp*, 5 *Ves.* 849, 860 ; *Butcher v. Butcher*, 9 *Ves.* 382, 397 ; and 1 *Ves.* and *B.* 79, &c.

(2) It is very observable, that in the principal case no point was raised, as to any appointment being illusory. *Ann* did not claim more than her 100*l.* with the interest. Vide *Reg. Lib. et 9 Ves.* 392.

(3) Vide 4 *T. R.* 741 ; *Cowp.* 637 ; 2 *Bra.* 50, 54 ; 3 *Burr.* 1626.

(4) See 1 *Ves.* 60.

Page 646. GARTH *versus* BALDWIN, July 18, 1755,

(Reg. Lib. 1754. A. fol. 300.)

NOTES AND OBSERVATIONS.

Devise of real and personal estate in trust for A.

THE devise was to *Charles Baldwin*, "his heirs, executors, &c."

(1) See

* (1) See *Bagshaw v. Spencer*, 1 *Ves.* 142, *et antea* 82, 83. As to the case of *Colson v. Colson*, cited in *Bagshaw v. Spencer*, 1 *Ves.* 147, and in the principal case, 2 *Ves.* 647, Lord Hardwicke certainly disapproved of the decision. *Vide antea* 83, and 2 *Burr.* 1109, to the same effect.

Colson v. Colson, is in 2 *Stra.* 1125 ; 2 *Atk.* 246, &c.

Withers v. Algood, mentioned p. 648 and 652 of the Rep. as cited in *Bagshaw v. Spencer*, appears from *R. L.* 1 *Ves.* 150, and is in *Reg. Lib.* 1734, *B. fol.* 276. *Sands v. Dixwell*, cited p. 652. appears also cited in the same vol. 234. The third edition has the following note attached towards the bottom of page 659 of the report.

[The rule of law (as to limitations of real estates) is, where an estate for life is given to the ancestor, followed by a limitation to his heirs general, or special, the subsequent limitation vests in the ancestor, and the heir does not take by purchase; for when after the limitation to the first taker, it is to go to every one who can claim as heir to him, the word heirs must be words of limitation, and all heirs taking as heirs, must take by descent. According to this rule Lord Thurlow determined the case of *Jones and Morgan*, 1 *Brown* 206; but where testator's intention appears contrary, the rule has been broke through, as in *Bagshaw v. Spencer*, 1 vol. 142, 2 *Atk.* 577.]

GARTH
versus
BALDWIN,
July 18, 1755.
[*435]

A. for life ; afterwards for B. for life ; and afterwards for the heirs of his body : afterward for the other sons of A. successively in tail ; taking testator's name ; then to the daughters in tail ; for want of such issue to convey to C. in fee. B. is entitled to a conveyance in tail of the real, and to the absolute property of the personal. The intent being at least doubtful, the legal operation of the words cannot be taken away ; (1) and as to the personal, it vested absolutely by such limitation, whether so intended or not.

[436]
VOL. II.

Page 661.

Interest not allowed on arrears of jointure, except on a very special case indeed. (2)

ANONYMOUS (1), July 21, 1755.

NOTES AND OBSERVATIONS.

(1) THE name of this cause was "*Bicknell v. Brereton*." See 2 *Ves.* jun. 167, and 4 *Bro.* 321. It is also reported 1 *Dick.* 278, under the name of *Bignal v. Brereton*.

(2) Vide *Creuze v. Hunter*, 2 *Ves.* jun. 157, &c. and the notes to *D. Bedford v. Coke*, (2 *Ves.* 116) *antea* 293.

Page 662.

LEECH *versus* TROLLOP, July 21, 1755.

(Reg. Lib. 1754. B. fol. 402.)

NOTES AND OBSERVATIONS.

Though an offer be made to confirm a widow's jointure, she is not

obliged to discover the title deeds by her answer, or until the offer is effectuated. She must, however, state the date of her jointure deed, whether it was executed at that time, and the premises therein comprized. (1)

(1) SEE in *Senhouse v. Earl*, 2 *Ves.* 450, and *Chamberlain v. Knapp*, 1 *Atk.* 52: likewise *E. Portsmouth v. E. Suffolk*, 1 *Ves.* 30.

ANONYMOUS (1), July 21, 1755.

(Reg. Lib. 1754. A. fol. 538.)

NOTES AND OBSERVATIONS.

A prior mortgagee may tack a subsequent judgment.

(1) THE name of this case is *Jackson v. Langford*.

(2) See

(2) See *Jones v. Smith*, 2 *Ves.* jun. 372, 376, &c. ; *Adams v. Claxton*, 6 *Ves.* 226 ; and *ex parte Knott*, 11 *Ves.* 609. ANONYMOUS,
July 21, 1755.
[437]

judgment ; but a prior judgment creditor obtaining a subsequent mortgage, cannot.

A prior mortgagee, however, cannot tack a bond-debt against the mortgagee, his assignee of the equity of redemption, or creditors ; *though he may, as against the mortgagee's heir, to prevent a circuity.* (2)

PAWLET *versus* DELAVAL, *et e contrà*,
July 28, 1755.

VOL. II.
Page 663.

(Reg. Lib. 1754. B. fol. 480.)

NOTES AND OBSERVATIONS.

(1) See *Clinton v. Hooper*, 1 *Ves.* jun. 173. Et vide *Allen v. Papworth*, 1 *Ves.* 163, *et antea* 88 ; *Milnes v. Busk*, 2 *Ves.* jun. 488 ; *Whistler v. Newman*, 4 *Ves.* 129, &c. with the cases therein collected. Also *Sperling v. Rochfort*, 8 *Ves.* 164, 175 ; *Chaplyn v. Smith*, *ibid.* 183 ; per Lord Eldon, C. 9 *Ves.* 188 ; *Jones v. Harris*, 9 *Ves.* 486, 497 ; *Wagstaff v. Smith*, *ibid.* 520 ; *Richards v. Chambers*, 10 *Ves.* 580 ; and the cases there referred to.

A wife barred of all claim as to her separate estate by her own acts, in concurrence with the trustee and her husband in his life time, and by her affirmance afterwards.

With regard to what is said at page 669 of the Report, relative to gifts of a wife's separate property to her husband, it ought to be observed, that such a gift is never to be inferred *without very clear evidence*. See *Rich v. Cockell*, 9 *Ves.* 369 ; *Harvey v. Ashley*, cited p. 671, is in 3 *Atk.* 607.

Vide *Hargr. Co. Litt.* note to fo. 37, a.

Ex

[438]

VOL. II.

Page 671,
672.

The Court refused to pay a wife's money to her husband, though she consented in Court, and had no children; proposals having been formerly made to settle an equivalent in strict settlement, but which the parties wished to abandon.

Ex parte GARDNER, July 28, 1755.

NOTES AND OBSERVATIONS.

THE refusal of the Court in the principal case seems founded *on the possibility of there being children, who, the Court held, would be entitled to have the proposal effectuated*; and there seems little doubt, but a similar decision would now ensue on a case *exactly so circumstanced*.

There seems, however, no little inconsistency in the decisions with regard to the Courts of Equity allowing or refusing a *feme covert* to dispose of her property, even upon her consent, in Court, and where it was untouched by any kind of obligation. In *Willats v. Cay*, 2 Atk. 67. A. D. 1740, the Master of the Rolls allowed it, *though the husband was insolvent*. In *ex parte Higham*, A. D. 1754 (2 Vesey 579, et antea 419), Lord Hardwicke refused it, *though the husband was not insolvent*, and wished to employ it beneficially in his trade. In *Dimmock v. Atkinson*, in 1790 (3 Bro. 195), the Lord Chancellor held the application irresistible, *though much opposed*. The opinion of the Master of the Rolls was to the same effect in 1795. See 2 Ves. jun. 677, from whence the modern practice seems to be now so established, that in a much later case, viz. in 1804, Lord Eldon, C. lays it down as clear, that a wife may waive her equity for a settlement, even after an order for it pronounced; and at any time before its actual completion. See 10 Ves. 88.

WILSON

WILSON *versus* HARMAN, July 29, 1755.

(Reg. Lib. 1754. B. fol. 268.)

NOTES AND OBSERVATIONS.

(1) In that part of the Report where Lord *Hardwicke* considers the question as applicable to land actually purchased, His Lordship seems impressed by the old maxim of "*rent being incident to the reversion*;" and it seems clear, that if the land had been purchased, the case would not have fallen within the provisions of the Statute for the apportionment of rent, 11 Geo. II. c. 19, s. 15; that Act being referable only to demises or leases determinable on the death of the tenant for life.

[439]
VOL II.

Page 672.

Tenant for life of lands to be purchased with S. S. annuities, dying in the middle of a quarter, no apportionment of the dividends in favour of his representatives. If the land had been purchased, there would be no apportionment in such a case (1); and there is no apportionment on dividends in the public funds.

GARFORTH *versus* BRADLEY, Oct. 25, 1755.

Page 675.

(No Entry.)

NOTES AND OBSERVATIONS.

(1) As to the rights of the husband and those claiming under him, or standing in his place, relative to the wife's choses in action, &c. vide *Druce v. Dennison*, 6 Ves. 385, &c.; *Mitford v. Mitford*, 9 Ves. 87; *Wildman v. Wildman*, *ibid.* 174; *Carr v. Taylor*, 10 Ves. 574; *Wright v. Morley*, 11 Ves. 12; *Dorwell v. Earle*, 12 Ves. 473; *Baker v. Hall*, *ibid.* 497; *Baker v. Serra*, 14 Ves. 313.

Baron and Feme. Wife's choses in action unreduced into possession. (1)

MITCHELL

[440] MITCHEL *versus* NEAL, November 8, 1755.
 VOL. II.
 Page 679.

NOTES AND OBSERVATIONS.

WITH regard to what is stated in the margin, &c. at the bottom of the page in the Report, referring to *Richards v. Evans*, [1 *Ves.* 33]; *Chapman v. Smith* [2 *Ves.* 506]; and *Carte v. Ball* [1 *Ves.* 3]. Vide *antea* 34 and 395. Et per Lord Eldon, C. in *O'Connor v. Cook*, 6 *Ves.* 671. His Lordship there observes, "Courts of Equity in ancient times were more in the habit of taking on themselves the decision of questions of fact, in such instances, than they have thought wise and discreet in later times. All the Judges have, of late, thought it more wise and discreet to send the question of fact to a jury, where any reasonable doubt."

Page 681. WILLIAMS *versus* JEKYL, and
 ELLIOT *versus* JEKYL, November 8, 1755.
 (Reg. Lib. 1755. B. fol. 219.)

NOTES AND OBSERVATIONS.

S. P. 1 Scho. & Lefr. 281.

Lease for three lives to A. her executors, &c.

(1). A. assigns all right to the use

(1) THE interest in estates "*pur autre vie*," to a person, "*his executors, &c.*" beyond the debts, belongs to those who are entitled to the personal estate, and the executor was held a trustee for the *residuary legatee*. Vide *Ripley v. Waterworth*, 7 *Ves.* 425, &c. and 450, 451.

(2) S. P.

* (2) *S. P. Campbell v. Sandys*, 1 *Schoales and Lefroy* 281.

As to the case of *Forth v. Chapman*, cited in the report p. 683, see 3 *Atk.* 288.

With regard to what appears at the bottom of page 683, see per Lord *Eldon*, C. in *Ripley v. Waterworth*, 7 *Ves.* 450, 451.

The Decree in the principal case is stated in 1 *Scho. and Lefr. Rep.* 291; but it is not very material.

executors, &c. The whole vests in the issue of B, and issue and A.'s executor, who was a special occupant, cannot claim against it. (2)

WILLIAMS
versus
JEKYLL, and
ELLIOT
versus

JEKYLL,
Nov. 8, 1755.

[*441]

use of B. for life,
and afterwards
of his issue;
and for want of
such issue, to
the use of A. her

means children;

* WILLOUGHBY and WILLOUGHBY.

In Chancery, *June* 19, 1756.

VOL. II.

Page 685.

Reported from the MS. notes of Lord Chancellor *Hardwicke*, by *Durnford* and *East* [1 T. R.] 763.

As a much more full Report is to be found in the *Collectanea Juridica*, (1 vol. p. 337.) which is now a rather scarce book, the author of these notes will subjoin it to the present short note.

* This case is not
reported in the
folio edition;
dis taken, as
it appears here,
from the third
or Irish edition.

NOTES AND OBSERVATIONS.

* WHERE a subsequent purchaser, or mortgagee, who, *pro tanto*, is a purchaser, has notice of a former purchase or incumbrance, before he becomes possessed of his own security, vide *Wortley v. Birkhead*, 2 *Ves.* 574, he cannot avail himself

* 2 *Ves.* 485, 486.

WILLOUGHBY
and
WILLOUGHBY
In Chancery,
June 19, 1766.

[442]

of an old outstanding term prior to both, in order to get a preference ; but if he has no notice of such prior purchase or incumbrance, and having the best right to call for the legal estate, gets an assignment of it, equity will not deprive him of the benefit of it ; for a purchaser *bona fide* for valuable consideration, and without notice, cannot be hurt in equity, nor have the benefit of the law taken from him. Notice makes him come fraudulently. Also where a second mortgagee of an estate, on which there is an old outstanding term, has notice of an incumbrance prior to his own ; as he has not the legal estate in him, nor the best right to call for it, the whole title and consideration being in equity, the general rule must take place, viz. * “ Qui prior in tempore potior est jure,” and the prior incumbrancer may satisfy himself of any other incumbrances on the estate, though unknown to the puisne mortgagee when he advanced the money.

• 2 P. W. 495.

WILLOUGHBY

[From *Collectanea Juridica*.]

CASE OF WILLOUGHBY and WILLOUGHBY, in CHANCERY, before LORD HARDWICKE *. Lincoln's-Inn-Hall, Dec. 17. 1755.

Mr. Attorney General †.

My lord here is an abstract produced by order. It was laid before counsel by the mortgagee before he lent his money; wherein the marriage settlement, and Mrs. *Willoughby's* jointure, is stated; and the counsel tells him it will be subject to that.

Abstract of the Deeds and Writings relating to the Title of HUMPHREY WILLOUGHBY, Esq. read.

" 27th March 1716. An indenture between *George Willoughby*, son and heir of *Charles Willoughby*, of the first part; *Thomas Coker*, second part; and *Wadham Windham*, third part; whereby, in consideration of 2500*l.* paid to *George Williams* by *Thomas Coker* (being the same sum of money mentioned in an assignment bearing even date herewith, and made between the said *George Willoughby* of the one part, and *Wadham Windham* of the other part), the said *George Willoughby*

If a subsequent purchaser or mortgagee has notice of a former purchase or incumbrance, he shall not avail himself of an assignment of an old outstanding term prior to both, in order to get a preference; but if he had no notice of such prior purchase or incumbrance and has the first and best right to call for the legal estate, then, if he gets an assignment of it, a court of equity will not deprive him of his advantage. If a second mortgagee lend

* This case has lately been cited as an authority in the Court of King's Bench, but no entire report of the several parts of it has been before printed. A short account of it is now extant in *Mr. Ambler's Reports*, lately published; and *Lord Hardwicke's* argument in giving the decree is printed in 1 *Term. Rep.* p. 763, principally agreeing with the above; but the prior arguments are here first printed, and the entry of the Chancellor's decree is considerably more full than in either of the above-mentioned reports of the case.

† *Mr. MURRAY.*

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICKE.

lend his money upon an estate upon which there is an old outstanding term, and has notice at the same time of a certain incumbrance prior to his own, the prior incumbrancer has the best right to call for the legal estate, and to satisfy himself of any other incumbrances upon the estate, although such other incumbrances were not known to the second mortgagee at the time he advanced his money.

by demises and grants to the said *Thomas Coker* all that manor, &c. to hold to *Thomas Coker*, his executors, &c. for the term of 1000 years, at a peppercorn rent."

"13th August, 1718. An indenture between *Thomas Coker*, first part; *Wadham Windham*, second part; *George Willoughby*, third part; and *Shilling* and *Popham* of the fourth part; reciting the last deed, and *George Willoughby's* assignment to *Windham*. Now, in consideration of 2600*l.* paid to *Thomas Coker* by *George Willoughby*, and of 10*s.* by *Shilling* and *Popham*, *Thomas Coker* assigns to *Shilling* and *Popham* the manor of Watchstone, &c. to hold for the remainder of the term in trust for *George Willoughby*, and to attend the inheritance of the premises."

"23d and 24th March 1718. An indenture between *Willoughby* and wife, and Sir *Gemmitt Raymond* and *Popham*, reciting a lease from the Bishop of *Salisbury*, dated 10th Dec. 1715; and indentures of lease and release of the 21st and 22d of March, whereby *George Willoughby*, in consideration of the marriage, and of 4000*l.* grants and conveys to *Raymond* and *Popham* the manor, &c. and that it might happen that the premises charged, &c. might not be sufficient now for the considerations aforesaid, and for securing the payment of the annuity to *Jane Willoughby*, and for settling, &c. and in performance of the agreement of the 13th Nov. 1717, *George Willoughby* grants and conveys to *Raymond* and *Popham* the manor of Watchstone, &c. to hold to them and their heirs to the use of *George Willoughby* for life; remainder to *Raymond* and *Popham*, to protect, &c. and after the decease of *George Willoughby*, to the intent

intent that *Jane* might receive yearly an annuity, &c. with power to make a distress, &c. and after his decease charged, &c. to the first and other sons in tail male, &c."

Lord Chancellor.

This is clearly notice. It will raise another question; whether the matter is not now all in equity? If it is all in equity, and the defendant cannot protect his legal estate against the equity of the marriage settlement; if he cannot do that, then the question will be, whether, as the whole must be considered in equity, it is within the rule *qui prius est tempore, potius est jure*? That was a question I thought upon at first; but, for want of proof, would not enter into it.

If it comes to this, the general question will be out of the case. It is a great pity but that general question was determined, for the sake of mankind.

I have had a great deal of discourse with Mr. *Filmer* upon the subject, who is a candid and a fair man, and I cannot find out from him any certain rule they have gone by. He told me what was Mr. *John Ward's* opinion and way of practice; and that was, as Mr. *Attorney* says, that they did not take these assignments. Here is an assignment of a term, with notice of a trust.

Mr. Attorney General.

My lord, there have been some cases looked into, but none like the present. *Ozwich* and *Simpson*: there were two mortgages; the first was to *Simpson*, the other to *Moreton*. *Moreton's* was assigned to attend the inheritance, and the plaintiff claims under that mortgage. *Simpson's* mortgage was prior; and defendants, by having taken in

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICK.

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICKE.

that, secure their purchase. It does not appear that *Simpson's* mortgage had ever been assigned to attend the inheritance.

Lord Chancellor.

I have looked into my copy of Lord *Somers's* notes, in the case of Lady *Radnor*; I cannot find there that the term was assigned to attend the inheritance. There is a great deal of difference in the case of a trust. I believe it will be proper for Mr. *Attorney* to go on to shew the distinction; there does seem to me to be a considerable distinction.

Mr. Attorney General.

My lord, it comes, in point of fact, to this: That this term was originally assigned to attend the inheritance, and consequently becomes subject to all the uses to which the inheritance was subject. It is assigned by the trustees to a new trustee, with express notice of these uses limited of the inheritance, prior to the mortgage taken by Mr. *Crips*. The consequence is, that his trustee would not take it to protect, in the first place, his mortgage; but he took it subject to all the former uses which it was to protect; and a trustee who takes an assignment with notice of a former trust, is to all purposes a trustee just in the same situation as the former was. What is the consequence? That all the uses of the marriage-settlement, all the uses that had been derived out of the inheritance by the owner, must take place. Who have a right to call for the protection of this term? All persons having a right to the legal estate; that is here the jointress.

The great point here is, when there are two equity securities and a legal estate, and the two equity

equity cases contending, the question is, who has a right to the protection from the legal estate?

In the case of Lord *Pomfret* it was held, that where a legal estate was in a trustee, and the owner had a right in equity to call for the protection of the legal estate, he should have it. Who has it here? The jointress unquestionably. Who has that right next to her? The owners of the uses of the inheritance that are prior, in point of time, to the mortgage. The trust of attending the mortgage is plainly a bad one.

Where there are two equities, then, supposing neither had a right, *qui prius est tempore, potius est jure*.

In the case of *Gibson*, when none of them had any previous right to the legal estate, it was held that they must go according to their priority.

I must submit it to your Lordship, that there is a difference between taking a term that is expressly assigned to attend the inheritance, and an assignment of a satisfied mortgage term, which might be made so by construction. It is in his own possession, and uses and trusts may result; but when upon the face of it it is made to attend the inheritance, he must enquire, what are the uses it is to attend?

How is the assignment here? In trust to attend the inheritance? What is that inheritance? Just what estate he would have conveyed. Suppose Mr. *Willoughby* had made a conveyance without making an assignment in this manner of the term, how would it have operated? Subject to the term of years. He would only grant it subject to the former uses and charges; and this is with express notice of the settlement, which he
has

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICKE.

Case of
WILLOUGHBY,
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICKE.

has no way mentioned. Upon reading the assignment, his taking it appears to be a fraud. If he meant to lend his money subject to the jointure or charge, he should have recited it so; but instead of that, he takes it to defeat the jointress, if he can.

Lord Chancellor.

Is there no exception of the jointure in the covenant against incumbrances?

Mr. Attorney General.

None, my lord. It is a breach of trust; and this Court will never suffer him to take advantage of that. They have blinked the truth in their answer by concealing it; and now at the bar they have urged to have it preferred to the jointress, in order to edge out her title.

It deserves well to be considered what inconveniencies would arise, if assignments are made to attend the inheritance, and you do not give notice of the trust. What would be the consequence with regard to a marriage settlement? By playing that term into the hands of a mortgagee from whom the settlement is concealed, you might trip up the heels of many settlements; whereas by express terms, he only takes it as a mode of conveyance, mere matter of form. It must be subject to all the uses to which the inheritance is limited; and whoever comes in under that term, comes in under the uses to which the inheritance is limited.

Lord Chancellor.

Mr. Attorney, I thought you would have entered upon the particular point, how far he can protect? Here is notice; he certainly cannot protect against the jointress.

Mr.

Mr. Attorney General.

My lord, all the prior uses of the inheritance it is certainly subject to: then we shall have the direction of the Court to protect this jointure. He cannot protect his security against the jointress: then the only question is, what uses of the inheritance are to take place next after this rent-charge? They can put in the legal estate as between the rent-charge, and *Mrs. Willoughby's mortgage*.

There he has no prior right to call for the protection of the legal estate, because the assignment is in breach of the trust.

Here is an application to the Court for directions in what manner this is to attend the inheritance. We have the prior equity. It must be as the uses are created. Perhaps that comes within the nature of the uses which the term is to protect. He cannot divide it, he cannot split it. If he had recited the settlement and taken it, subject to the rent-charge of 300*l.* a year, he would have had a much better case of it, because he would have been supposed to have acted fairly. Here he has not. He has notice, and he has endeavoured to set up the term against the jointress with express notice.

Mr. Sewell.

Your lordship will please to favour me on this point, as between the mortgagees. I did perceive, by the answer, that the Defendant had expressly denied notice of the mortgage, but took no notice of the settlement. The Plaintiff only charges, that the Defendant had notice of it when he lent his money. Now here is but barely sufficient to satisfy the Plaintiff claiming under the settlement,
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Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICKE.

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICK.

and one of the mortgagees ; therefore the question remains as between these two mortgagees.

I shall first submit it to your lordship upon the foot of our having an assignment of the term (without going into that matter at all), upon a supposition, in the first place, that we can make use of the term that we have in our trustee (except so far as we have notice ; and I shall submit it to your lordship upon another circumstance ; and that is, as to the conduct of Mrs. *Willoughby* in leaving her deeds in the hands of her son, which enabled him to go on and make a second mortgage. Then, upon a supposition that it was proper to take an assignment of the term, and that we would make use of it against those who claim under the settlement (provided we had no notice) ; now that we have notice, it will only postpone us as to those of whose right we had notice.

Here is 300*l.* a year to the widow ; then a term to raise younger children's portions, &c. *Henry Willoughby*, upon the death of his father (subject to the jointure, &c.), became entitled as tenant in tail ; and he suffered a recovery, and limited the uses to the Defendants *Garrard* and ——— and their heirs ; the legal estate is now in them ; it vested in them in trust, and for such purposes as the Defendant, *Henry Willoughby*, should appoint. 23d June, 1751, *Henry Willoughby* makes the mortgage in question to his mother for 870*l.* in this manner : by a deed dated the 23d of June 1751, he appoints the estate so vested in the *Garrards*, the trustees, for the benefit of his mother for the term of 500 years, redeemable upon payment of 870*l.* In a year afterwards (to wit), in June 1752, 15th and 16th, by lease and release, at
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the time that the Defendant *Crips* lends *Henry Willoughby* 800*l.* he professes to make a legal conveyance to *Crips*, and at the same time he assigned the term in question to *Boot* as his trustee, for the benefit of Mr. *Crips* and his heirs, in trust to attend the inheritance, and for better securing the repayment of the mortgage-money. As to the first question, it is certainly true, that where a man takes a legal estate, with notice of a prior incumbrance (whether it is conveyed to himself or to a trustee), he shall certainly be postponed as to that of which he has notice; that is clear.

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICK.

The question then is, if there is something of which he has no notice, whether he can protect himself against that of which he has no notice, postponing himself to that of which he has notice?

Consider the foundation of the first incumbrance. First, we must suppose that the legal estate is in Mr. *Crips*.

Lord Chancellor.

You presume too much; you must take it to be in the trustee; for it is a question which has the first and preferable right. If he had had the legal estate, he might have done it.

Mr. Sewell.

My lord, I mean his trustee that is subject to that opinion of its being a term expressly assigned to attend the inheritance. Suppose it a satisfied mortgage term, that comes to Mr. *Boot* as a trustee, for Mr. *Crips*; then the question is, whether the Plaintiff has any equity against Mr. *Crips* or Mr. *Boot*, for any thing more than that security of which Mr. *Crips* had notice?

The foundation of all must be, that the Defendant

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICK.

ant intended only to take the estate as it was, subject to the prior incumbrances; because the assignment of the term is affected with the trust of which he had notice; therefore there is a right in equity to secure that. There is so far a right to call for the protection of the legal estate in this manner: I shall not be considered as a trustee for you, so far as I have a prior right.

The question is, how far she has a right in equity? The whole right is founded upon equity. That is the foundation upon which notice affects the Defendant; therefore the equity on the one side cannot go farther than the equity on the other. Suppose two mortgages are made; and suppose that the first mortgagee had the legal estate in fee conveyed to him for the security (say) of 1000*l*. then the second mortgagee comes with notice of the first mortgage, and he lends a further sum of 1000*l*. he is postponed to the first mortgage, the legal estate of which is complete (but indeed, in the present case, it is in the trustee, subject to your lordship's opinion). Suppose the first mortgagee goes on and lends more money (say) a further sum of 1000*l*. then there will be 2000*l*. due to the first mortgagee, and 1000*l*. due to the second mortgagee, who would come in between the first and the third mortgage. The question will be, whether the first mortgagee shall have a satisfaction for both 1000*l*. prior to the second mortgagee? What will be the consideration in that case? It will be simply this: whether when he lent the further sum of 1000*l*. he had notice that the second mortgage was executed? If he had no notice, he would by that means tack the third to the first; and the only reason for his doing

doing that would be, that he had no notice that there was a further sum of 1000*l.* lent by the second mortgagee. But suppose that after he had lent the first 1000*l.* he had notice that a second mortgage was made, and, notwithstanding, that the first mortgagee lends a further sum of 1000*l.* in that case he would be clearly postponed to the second mortgage as to the last 1000*l.* because he had notice before lending his money.

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICKE.

This would be the case even where the first mortgagee had the full and complete estate in him; much more will it be so now, when he comes into equity to have the assistance of the legal estate against Mr. *Crips* and Mr. *Boot*, in whom the legal estate is. Say they, we have the first incumbrance, and therefore we have a right to the benefit of the trust term. The question is, how far? We say, so far as we have notice you have a right; but so far as you lend money afterwards, you have no right. The consideration of which I have notice I must be postponed to, but not to the further consideration.

Suppose it had been recited in the mortgage to Mr. *Crips*, that there was this settlement, and that he took the term subject to this prior incumbrance: in this case, would he not have a right to hold against every thing but what is recited? Certainly he would. And why? Because, in conscience, he is only affected with that of which he has notice. Therefore, upon a supposition that the Plaintiffs cannot have the benefit of the trust-term without coming into this court, they certainly can only have it *quoad* notice. It is the notice only that gives them the equity. That is all upon a supposition that they have such a right in equity,

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICKE.

equity, and it can only be so far as they have a priority. This is what occurs to me upon this part of the case.

The other point is as to the manner of Mrs. *Willoughby's* taking her mortgage, which is prior.

In declaring the use of the recovery, she, in fact, has no legal estate; and therefore, though the term was to attend all the legal estates, yet, in fact, she has no legal estate: the uses of the recovery are to the uses of the *Garrards* and their heirs. They are now seised of the fee in failure of appointment by *Henry Willoughby*. The 500 years term for the Plaintiff, his mother, is only an equitable term; it does not at all take the legal estate out of the persons in whom it is vested, by the declaration of uses of the recovery. If it had been to such uses as *Henry Willoughby* should appoint, that appointment would have vested a legal estate; but when the legal estate is vested in trustees, then the appointment is only an appointment in equity.

There is this further to be offered: this is dated in *June 1751*; she suffers the title-deeds to remain in the hands of the son twelve months, who makes a mortgage, and delivers over the title-deeds.

Lord Chancellor.

Mr. *Sewell*, is that made a point of in the cause? Every time this cause is spoke to, new points are started.

If you had intended to take advantage of a fraud in the first mortgagee, you must make a point of it, and examine to it; it depends upon particular circumstances.

This point has grown by time. By being so often mentioned, and further considered and attend-
ed

ed to, it is become an important question : I therefore shall not determine it now ; I will consider of it during the holidays, and tell you my opinion.

Case of.
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICK.

One thing strikes me with regard to the general principle laid down by Serjeant *Maynard* in the Duke of *Norfolk's* case : he lays it down in express terms, as a thing known, that whoever has a term, or creates a term, which is afterwards assigned to attend the inheritance, he being owner of the inheritance, may, if he pleases, sever the term from the inheritance. I do not doubt but that is true ; still the question here comes to be this : suppose a man has such an inheritance as this, and the equity of the term (only a partial interest in the inheritance, with particular estates divided off from it), as that the mother is tenant for life of the estate itself ; can he, being owner of the inheritance, subject to particular estates divided out of it, and without notice of those particular estates, make a good mortgage, and direct the trustees of the term assigned to attend the inheritance to assign to the mortgagee, and will that be effectual ? As the trust was to attend the inheritance, it must attend the freehold, and the particular estates derived out of it. It is going a great way when I lay it down as a principle and say, that an interest assigned shall always go along with the inheritance ; that a fine and recovery will carry along the equity of the term. Notwithstanding a term cannot have a recovery suffered upon it, still this carries with it a particular term attendant upon the inheritance ; so that the new uses shall mould and vary the trust of the term. When it is so, ought this court to suffer

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICKE.

a partial owner of the inheritance, subject to particular estates, to sever that from the inheritance? It would be going a great way to do that.

The next thing here is, whether it does not come to that; though the mother has only a rent charge, yet it is a charge upon the freehold and inheritance, and consequently it is as much to be protected by the term as the particular estates.

It is going a great way to say, where a man has the fee, subject to particular estates, he can separate such a term from the inheritance, notwithstanding the entire owner of the inheritance may do it.

Mr. Attorney General.

My lord, he may make it either real or personal estate.

Lord Chancellor.

Let it stand at the head of the paper the last day of exceptions before next term.

Lord Chancellor.

Saturday,
June 19, 1756.

This cause comes before the court upon a bill brought by the Plaintiffs to have a satisfaction for several incumbrances out of a real estate, and to have a sale of the estate for these purposes; and the only dispute between the parties in the cause is, as to the priority and preference, in the opinion and judgment of this court, between two particular incumbrances, two mortgages: the first of which, and prior in point of time, is claimed by the plaintiff, the widow; and the other of which is posterior in point of time, but still claimed to have a preference, and is in the defendant *Crips*.

The case upon which it arises is this; *George Willoughby*, the plaintiff *Jane's* husband, was seized in fee of the estate in question, subject to a mortgage

mortgage for a term of years; and the 12th of Nov. 1717, in consideration of, and previous to his marriage with the plaintiff *Jane*, he enters into articles to settle the estate in this manner: first, to himself for life; and in the next place to secure a jointure of 350*l.* *per annum* to the plaintiff *Jane*, with remainder of the whole of this estate to the first and other sons of the marriage in tail male; with remainder over to *George Willoughby* in fee. There was a power reserved to *George Willoughby*, by the father, to charge the premises either by any deed executed in his life-time, or by his last will, with 3000*l.* for younger children's portions, which portions are part of the demands of the Plaintiffs in this cause.

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICKE.

On the 24th of *March* 1719, a settlement was made in pursuance of these marriage articles; and the 17th of *August* 1718, which was prior to the making and executing that settlement, an old mortgage term (to which the estate was subject at the time of the entering into the articles): that term was assigned over to two trustees, *Shilling* and *Popham*, upon an express trust declared; which was in trust for *George Willoughby*, his heirs and assigns, to attend and wait upon the freehold and inheritance of the premises, and to be subservient thereto.

This you see was an assignment made the 17th of *Aug.* 1718. The marriage settlement executed in pursuance of the articles, was on the 24th of *March* following.

On the 24th of *March* 1750, *George Willoughby*, the father, made his will, and by that he executed his power by charging the estate with the sum of 3000*l.* for younger children's portions; and afterwards

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICKE.

wards the testator died, leaving the plaintiff *Jane* his widow, *Henry* his eldest son, and three daughters, who are co-plaintiffs, and a younger son *George*.

The plaintiff, *Jane Willoughby*, is entitled, under the marriage settlement, to a jointure of 350*l.* a year. The defendant, *Henry Willoughby*, was the tenant in tail under the marriage settlement; and after the death of his father, *Henry* suffered a common recovery, and barred the entail; and he declared the uses of that recovery to be to trustees and their heirs; upon trust, nevertheless, and to the use of such person and persons, for such estate and estates as he the said *Henry Willoughby* should by deed appoint.

After he had suffered this recovery, he borrows the principal sum of 870*l.* of his mother, and by an appointment in pursuance of the deed declaring the uses of the recovery, he limits the estate to her for a term of 500 years; but all this time the old term remained in the trustees, *Shilling* and *Popham*, to whom it was assigned in 1718.

On the 15th of *June*, 1752 (which was in point of time about two years, or a year and nine months after making the first mortgage), the Defendant, *Henry*, borrowed 800*l.* of the Defendant *Crips*; and for securing the repayment thereof, made a mortgage of the inheritance to the defendant *Crips* in fee; and by deed *Shilling*, the surviving trustee in the old term, by the direction of the Defendant *Henry Willoughby*, assigned that term to the Defendant *Alexander Boot*, to protect *Crips*' mortgage of the fee-simple.

It appears in evidence in the cause, that previous to the taking the mortgage, and expressly upon that

that occasion, *Crips* had full notice of the articles on the marriage; and notwithstanding that, there is a covenant from the defendant *Henry* in the mortgage-deed, that the premises are free from all incumbrances, except an indenture of assignment of the old term to *Boot*, which is the same day, and besides the term and the mesne assignments thereof; but it does not appear that the defendant *Crips* had any notice at all of the mortgage made by the defendant *Henry Willoughby* to the plaintiff his mother. The plaintiff *Jane*, the mother, together with the younger son, bring their bill to have the benefit of her jointure for a sale of the estate subject to the jointure of 350*l.* a year, and out of the money arising by sale to be paid the arrears of that jointure; and in the next place to raise the provision for the younger son and daughters, and then to be paid her mortgage of 870*l.* and the other incumbrances in their order.

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICKE.

The defendant *Crips*, who is the puisne mortgagee, now submits, that the jointure and the provision for the daughters and younger son be preferred to him; but insists that his mortgage shall be preferred in payment to the plaintiff *Jane's* mortgage; because the legal estate of the prior term is vested in the defendant *Boot*, who is his trustee, and he is a purchaser of it without notice of the first mortgage. What he founds himself upon is this principle, that the legal estate in the term being vested in a trustee for him, he has both law and equity on his side; and the defendant *Jane* has only equity as against the term.

Two questions have been argued at the bar. The first is a general question, and of great consequence: whether this old term, which was

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICKE.

vested in *Shilling* and *Popham*, having been assigned to *Shilling* and *Popham* upon an express trust declared (to attend upon the freehold and inheritance), the defendant *Crips* would in equity have the benefit of it to protect his mortgage both against the jointure, the younger children's portions, and the prior mortgage; even supposing he had no notice whether he would have the benefit of the term to protect that mortgage as against them.

The second question is a particular question: whether the defendant *Crips*, having full notice of the marriage settlement, and the jointure and the portions, and consequently not being entitled to the entire absolute benefit of the legal estate of the old term, can be preferred to the plaintiff *Mrs. Willoughby*, even as to her mortgage? or, whether he must not come in, as to his mortgage only, according to priority; or as it is in order of time? These are the two general questions. And as to the first, as I stated it, it is this: whether this term having been assigned to *Shilling* and *Popham* upon an express trust declared to attend the inheritance, the defendant *Crips* would in equity have the benefit of that term to protect his mortgage, both against the jointure, the portions, and the prior mortgage, supposing he had no notice?

That depends upon three considerations.

First, the nature of a term assigned to attend the inheritance. Secondly, what kind of grantee, or owner of the inheritance, is intitled to the protection of such a term? or, in other words, in whose hands such term should be allowed to protect the inheritance? The third is, against what estate, charge, or incumbrance the protection arising

ing from such a term assigned to attend the inheritance shall extend?

These are the three considerations upon which the first question depends.

First, what is the nature of a term attendant upon the inheritance?

The attendancy of a term for years upon the inheritance is the creature of a court of Equity, invented partly to protect real property, and partly to keep it in a right channel. There are two ends answered by it; partly to protect real estates, and partly to keep them in a right channel.

In order to this, they have framed distinctions between such an attendant term, and a term in gross. The courts of common law can keep out the owner of the fee-simple so long as the term subsists; but as equity always considers who has the right in conscience to hold, and upon that ground declares one person to be a trustee for another; and as the common law allows the possession of tenant for years to be the possession of the owner of the freehold; so this court, where the tenant for years is but a trustee for the owner of the inheritance, will not keep out the *cestuy que trust*, nor, *pari ratione*, obstruct him in any act of ownership, or in subjecting the estate to any incumbrance; and therefore such a term would go according to the uses or appointments which the owner of the inheritance shall carve out; and thus the dominion of real property is kept intire.

Of these cases I meet with none in the books before Queen Elizabeth's time, when mortgages for a long term of years began.

The first is the *Duke of Norfolk's* case. Before that time the law looked upon a long term of

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICKE.

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICKE.

years with a jealous eye, and laid them under violent presumptions of fraud, because they tended to deprive the crown of forfeitures, and the Lord of his perquisites of his tenures; neither would there be any falsifying by a termor. But the tenant for years was in the power of the owner of the freehold till the 21st Hen. 8. which enabled them to falsify a recovery. Before that, the term was gone by the recovery; but since the alteration of the law by that statute, and the term being by the statute preserved, this court would lay hold of it; and they proceed upon this principle.

Wherever a term is vested in a stranger, in trust for the owner of the inheritance, and which, by any trust expressly declared, is attendant upon the inheritance, or where it is so by the opinion and judgment of this court (that is a trust by operation of law), this court has said, that the trust or beneficial interest of the term being affected by all such charges as the owner creates touching the inheritance (though the law says that the term for years and the fee-simple being in different persons, they are separate and distinct, and the one not merged in the other), yet the beneficial interest in both being in the same person, equity will unite them for the sake of keeping the property entire; therefore if the owner of the inheritance levies a fine *sur conusans de droit*, or suffers a recovery, the use of the term follows that, though a term is not the proper subject of a fine or recovery.

This doctrine is always allowed to have its full force, as between the heirs in fee simple and in fee tail, owners of the inheritance, and all claiming under them as volunteers (though certain distinctions have been mentioned which are not material now);

now); and in general the rule is the same, whether the trust of the term be created by express declaration, or arise by the construction and judgment of this court.

Upon this ground is the case of *Tiffin* and *Tiffin*, 2 Cha. Ca. 49. 55. 1 *Vernon*, 1. *Best* and *Stamford*, 2 *Vern.* 520. Precedents in Chancery. 252. *Hayter* and *Rod*, 1 *Williams*, 360. *Whitchurch* and *Whitchurch*, before the Lords Commissioners, 2 *Williams*, 236. *Lord* and *Lady Dudley*, precedents in Chancery, 241. 2d. Cha. Ca. 160. upon the custom of the city of *London*.

All these cases were cited at the bar; I chuse to put them together without stating them, because they all tend to prove this general proposition, that as between the representatives of the owners of the inheritance, or any person claiming voluntarily under them, this doctrine relating to the term's following the inheritance does take place; in all these cases the Court considers the trust as annexed to the inheritance, though the legal interest is separated (else it would be merged). This gives the Court an opportunity to make use of the term as a guard for the owner of the inheritance against mesne conveyances (which would carry the fee at common law), and decrees it to the person who was owner of the legal and equitable inheritance against such incumbrances as he ought not to be affected with in conscience. And in order to do this, this Court often disannexes the trust of the term from the strict legal fee; but still it is in support of right, and that which is *bond fide*.

This brings me to the second consideration: what kind of grantee, or owners of the inheritance, is intitled

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICKE.

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICKE.

intituled in this Court to the protection of the term assigned? or in other words, in whose hands such term shall be allowed to protect the inheritance?

In the first place, a person who shall claim the benefit of such a term to protect his inheritance, must be a purchaser for a price paid, or for a valuable consideration; he must be a purchaser *bond fide*, not affected with fraud or collusion, and a purchaser without notice of the prior incumbrance, charge or conveyance; for notice makes him fraudulent. And here I do take in all persons claiming under marriage-settlements; they are purchasers.

If such purchaser has no notice of the mesne incumbrance, and happens to take a defective conveyance of the inheritance (defective either by reason of a prior conveyance, charge or incumbrance, or otherwise), and also takes an assignment of a term to a trustee in trust for himself, or has the term assigned to himself and the inheritance to a trustee, in both these cases he shall have the benefit of the term to protect him; that is, he may make use of the legal estate of the term to defend his possession; or, if he has lost the possession, he may make use of it to recover that possession at common law, notwithstanding his adversary has at law the strict title: that made me say, that the Court often disannexes the trust of the term from the fee, and still they do it in support of right. If a man that has paid a fair price for his land, has acquired an estate which the law will support, if he has got a plan by which he can at law secure himself, there is no ground in equity or conscience to take it from him.

This is the meaning of the rule, that where a
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man has both law and equity on his side, he shall not be hurt in a Court of Equity.

It was once doubted, when a term was vested in a third person, who should be allowed the benefit of it in equity, for whom the stranger should be a trustee. The rule is, *qui prior est tempore potius est jure*.

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICK.

Lord Cowper lays it down to be a rule, that where a man is a purchaser for a valuable consideration, without notice, he shall not be annoyed in this Court; not only where he has the prior legal estate, but where he has a better right to call for the legal estate than his adversary, and therefore dismissed his bill.

Here I must observe, that he must have a better right to call for an assignment of the legal estate; and I do it for the sake of the use I shall make of it by and by.

The third consideration is, against what estates charges or incumbrances, the protection arising from such attendant term shall extend? The answer to this question may be laid down very general against all estates, charges and incumbrances, created or introduced between the raising of the term and the purchase.

But here I desire it may be understood, that I take in all the qualifications or requisites before laid down: that there should be a valuable consideration; that he should be *bona fide*; and that there should be an entire fairness in the purchase, unaffected by notice express or implied, and having the first and best right to call for the legal estate of the term.

All these must occur to warrant this protection, otherwise he cannot have it.

Here

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICKE.

Here several distinctions were attempted.

1st. That this will be so where the old term is standing out in the original mortgagee or grantee of it, or his representatives, and never assigned upon an express trust to attend the inheritance; but that where it is assigned upon an express trust, there it will attend the first limitation of the inheritance and all estates arising out of it; as here, the uses of the marriage-settlement; and the subsequent purchaser, without notice, gains no benefit from it.

2d. Where it is so assigned to attend the inheritance, it becomes so annexed that it cannot be severed from it.

That where it so remains in the original mortgagee never assigned, there no purchase or mortgagee taking an assignment can gain a benefit by it; but where it is so assigned, it shall not be severed from it.

This was an attempt to establish a distinction between an express declared trust, and a trust arising by construction, or a judgment of a Court of Equity.

There was no authority or precedent cited to warrant this distinction; the only case wherein any thing of that nature appears, is to the contrary, in *Equity Cases Abridged*, 355, *Orwell* and *Brockett*. How authentic that is, I cannot say: I do not find it reported in any other book, and the decree is not entered in the Register's book: the minutes are so imperfect, that nothing material can be collected from them, except that there was a mortgage term assigned to attend the inheritance.

In the first place it was urged, that where a term
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is expressly assigned to attend the inheritance, that is notice to a purchaser that there are those limitations of the inheritance to be protected by it ; and if so, the purchaser takes the assignment with notice of the limitations.

I take this to be a mistake ; such an assignment to attend the inheritance is notice of nothing but that there is an inheritance to be protected and attending it ; but it by no means implies that the inheritance is bound by special limitations ; for a satisfied term is often assigned to attend the inheritance in fee-simple as well as in fee tail, and estates carved out by particular uses and limitations : such assignment, therefore, gives notice to a purchaser of nothing but what he had notice of by having the deeds relating to the fee ; and in these cases it is the same, whether the trust is express or implied.

Indeed, if the trust is to attend the inheritance as limited and appointed by such a deed, or to protect the uses of such a settlement (and I have seen a great many instances of such deeds and marriage settlements), in that case it certainly will be notice of the deed or settlement, and consequently of all the uses in it, and a purchaser would be bound to find them out at his peril.

I look upon this to have been the ground of the general application of this doctrine.

2dly. It was argued, that a term assigned to attend the inheritance is so connected with the inheritance, that it will go along with all the estates for valuable consideration : that wherever a new conveyance is made, the trust of the term will immediately follow, and the trustee will be a trustee for the new uses : that so it was upon the mortgage

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICKE.

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICK.

gage made to the plaintiff Mrs. *Willoughby*, by the defendant her son, and the term being in *Shilling* could not alter that.

I agree that it will be so against the grantor in the conveyance and his heirs, and all claiming under him as volunteers; so where the owner creates new uses or incumbrances, or new charges, as judgments or statutes staple, the trust of an attendant term is affected with it in like manner as the inheritance against the grantor and his heirs, and a purchaser or incumbrancer shall have the benefit of it: but wherever a purchaser comes in without notice, with the qualifications I have mentioned, and gets an assignment, he comes in in a different degree. As he has not only paid the value for the land, but got the law on his side, how can a court of Equity take it from him, without contradicting all their rules? Thus a subsequent purchaser, having no notice, will stand against the first, as in the common case.

There is a third objection: that this is severing the trust of the inheritance from the term, leaving the title of the inheritance to go one way, and the trust of the term another way; and that it is not in the power of the owner of the inheritance, after the first conveyance, nor of the trustee, to sever them. In answer to this objection, it is not necessary here to enter into a discussion of all the cases determined where it has been held that a term once attendant upon the inheritance may be disannexed again, and turned into a term in gross: it certainly may be done at any time by the owner of the inheritance; and it was so admitted by Serjeant *Maynard*, in his argument in the *Duke of Norfolk's* case. It may be made to become a term
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in gross upon a contingency, as often as it so happens.

Here is no severance in this case. *Crips* claims the term as attendant upon the inheritance in him.

In this court, had he come in without notice, he would have been considered as a purchaser *quoad* the mortgage. Though he took a defective title to the inheritance of the land, yet it is what he fairly bought, and he may protect it.

If the argument was to prevail, it would prevent every mortgagee or purchaser who has an assignment of an attendant term, from making use of it to protect his title.

This argument was enforced by saying, that it would be putting it in the power of the trustee to prefer which purchaser he pleases, by assigning the term over; and that he can no more do it than a trustee appointed to preserve contingent remainders can assent to the destruction of them.

These are both alike; and I take this to be upon the same footing as a trust to preserve contingent remainders. If such a trustee had joined in a conveyance to a purchaser for a valuable consideration, and the purchaser has either express or implied notice of that trust, the purchaser is affected with the trust to preserve contingent estates, and shall be decreed to reconvey the estate to the old uses: it was so agreed in the case of *Mansell* and *Mansell*. But if the purchaser comes in *bonâ fide*, and has no notice of the trust, he shall retain the estate, and then the trustee must make satisfaction for his breach of trust.

Just the same reason holds if a puisne purchaser has notice of the term assigned, &c. he can never avail himself of an assignment of the term, but

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICK.

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICKE.

but the court will decree it to be reconveyed. If he had no notice, the purchaser or mortgagee must retain the estate; but if the trustee, who joined in the assignment, had notice of such a term assigned, &c. the purchaser or mortgagee is in conscience affected by the trust. It was a breach of trust in him, and he ought to be decreed to make satisfaction; and this is what equity would demand.

But to go a step farther, and see to what extent this doctrine goes. It would make an assignment of a term to a purchaser's trustee of his own naming in effect to protect him against nothing.

There are, from the attendancy of the term on the fee, incumbrances made, or charges created upon the inheritance for valuable consideration that immediately draws after it every charge of the trust term. If therefore a purchaser takes it still bound by that derivative trust, a purchaser can never be safe: whether he has notice or not is nothing to the purpose; by this doctrine the estate is totally open to all prior incumbrances in the one case, as well as the other.

It was said to be a general rule for conveyances upon purchases or settlements, where they found an old term assigned upon an express trust to attend the inheritance, not to disturb it, or take an assignment to a new trustee, but rely upon it as it stood.

I have enquired of a very learned and eminent conveyancer, and cannot find there has been any such general rule; if there had, I cannot think it would have been material, as this case is circumstanced.

It is true, that Mr. *Ward* is known to have declared

clared it to be his opinion, and that he took it to be so. How far he practised in that manner does not appear. If he did so, it would not make a general rule. In reducing the practice to reason it must be taken with distinctions. Where an old term is assigned upon an express trust to attend and wait upon the inheritance, as settled by such a deed, or to the uses contained in such a settlement described, or referred to particularly, and the conveyancer employed is satisfied that the uses were never barred till the purchase deed, he may safely rely upon it, because the assignment carries with it notice of the old uses; and so his title is clear.

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICK.

And where the assignment is generally to attend the inheritance, he may, perhaps, rely on the old trustee safely, especially in the case of a purchase or mortgage, where the title-deeds are always taken along with the new deed; for if he has the creation or assignment of the term in his own hands, no use can be made of it against him.

Such instances as these account for the practice, but cannot constitute a general rule.

Much has been said at the bar of the danger and inconvenience to settlements by this means; but the inconveniences arising on the other hand break in upon the rule of equity.

That a purchaser for a valuable consideration shall not be hurt in equity, or have his security at law taken from him, put them in the balance against these arguments, and they will be found much to outweigh them.

These rules in equity are analogous to several rules of the common law—of collateral warranty, non-claim, descents which take away entries; which

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICK.

which rules are only contrivances to quiet possessions in people.

For these reasons I am clearly of opinion, upon the first point, that the defendant *Crips*, the mortgagee, would have been entitled to the protection of the term, both against the mortgage and the other charges, in case he had no notice of the settlement.

I shall seem to want an excuse for dwelling so long upon this part of the argument, as the decree will not turn upon this point. But this matter has been so much laboured at the bar, and appeared to me to be of so much consequence to titles, that I thought it necessary my opinion should be known, that the court might not be understood, by their silence, to countenance these distinctions.

The second point is a particular point, and arises upon the circumstances of this case.

The second question is, whether Mr. *Crips*, having notice of the settlement, but not of the mortgage, to Mrs. *Willoughby*, is not entitled to have the benefit of the old term; whether he can be preferred to Mrs. *Willoughby*, even in respect to her mortgage; or, whether he must come in according to priority?

I am of opinion, that the defendant *Crips* must come in only according to his priority in order of time.

My reasons are two. In the first place, he has not the legal estate in the term in himself; nor has he, as this case is circumstanced, the best or most preferable right to call for that estate.

In the second place, I cannot say that he took his mortgage clearly and *bond fide* in this case.

Consider how the right would have stood as between

tween the plaintiff and the defendant *Crips*, in case there had been no new assignment of the term, but the legal estate had remained in *Shilling*, the surviving trustee in the first assignment.

In that case it is most plain, that Mrs. *Willoughby's* mortgage would have been preferred; for whenever the legal estate stands out either in a prior incumbrancer, or in a trustee, as against whom a puisne incumbrancer has not the best right to call for the protection of it, the whole is in equity; and then, *qui prior est in tempore potior in jure*. And this last point is expressly determined by Sir Joseph Jekyll, in *Brace and Duchess of Marlborough*, 2 *Williams*, 491.

In that case it appeared, that a puisne incumbrancer bought in a prior mortgage, in order to unite that mortgage and his own, and gain a preference of an intervening mortgage. But it appearing, that there was a mortgage prior to that which he took in, the Court clearly held, that the puisne incumbrancer, where he had not the legal estate, would there have no advantage of this mortgage. But where the legal estate is standing out, the incumbrancers must be paid according to the priority of their mortgages.

This is the case where the legal estate is standing out; but it must be understood subject to Lord *Cowper's* qualification, so standing out that the puisne incumbrancer has not the better or more preferable right to call for the legal estate.

That Mr. *Crips* has not here; for he having full notice of the marriage settlement before he took his mortgage, the plaintiff Mrs. *Willoughby* has the preferable right, even as against the defendant *Boot*, to call for the legal estate in the term to protect

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICK.

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICKE.

tect her jointure ; she may call for it to be assigned to a new trustee in trust for herself. This brings the whole into equity, and subjects the case to that general rule *qui prior est in tempore potior injure*.

She might compel the defendant *Crips* to redeem her in respect of the arrears of her jointure incurred, and then he must redeem her entirely ; and this is by no means so strong an extension of equity as the tacking a third mortgage to a first mortgage in order to squeeze out a second, because it goes only to the preservation of the plaintiff's clear priority, which she had acquired by having the first mortgage.

In the second place, I think this point is materially corroborated against the defendant. In that the defendant did not take his mortgage *bond fide*, it appears to me, that he aimed at gaining an unfair advantage against Mrs. *Willoughby*. He had full notice of her settlement ; he knew well these to be incumbrances upon the estate ; and yet in contradiction to this, and with his eyes open, he takes an express covenant in his mortgage deed, that the premises were free from all incumbrances except the assignment of the old term to *Boot*, and the mesne assignments thereof.

This is plain, that he intended to conceal that full notice he had of the marriage settlement ; and in consequence of that he has not admitted that he had notice of that settlement by his answer, but puts the plaintiff upon proof of it ; and now it comes out, that it appears to have been fully stated, in a case that was laid before his own counsel, previous to the lending the money.

This was against conscience ; and it was a bad
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and an indirect intention against Mrs. *Willoughby's* securities.

For these reasons, I am of opinion, that the defendant *Crips* wants and stands divested of two ingredients necessary to entitle himself in equity to the protection of the old term against the plaintiff Mrs. *Willoughby*. He is not clearly a *bond fide* purchaser, nor has he the first and best right to call for the legal estate. Therefore he can come in only according to the order of time, which is posterior to the jointure, the portions, and the plaintiff Mrs. *Willoughby's* mortgage.

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICK.

MINUTES OF THE DECREE.

Let it be referred to the master to take an account of what is due to the plaintiff Mrs. *Willoughby* for the arrears of her jointure of 350*l.* a year, pursuant to her marriage-articles and settlement; and let the master likewise take an account of what is due to the plaintiff *George Willoughby*, the younger son, and the plaintiffs the daughters, for principle and interest of their respective portions, charged upon the premises in question, by virtue of the said marriage-settlement and their father's will; and let the master likewise take an account of what is due for principle and interest upon the mortgage to the plaintiff *Jane Willoughby*, and upon the mortgage to the defendant *Jeffry Crips*, and tax both of them their costs in respect of their mortgages; and let the whole estate be sold (subject to the jointure of the defendant *Jane*, unless she accepts an equivalent), then let the master set a value upon it, and let that be paid in the first place out of the monies arising by the sale to the best purchaser or purchasers that can be

Case of
WILLOUGHBY
and
WILLOUGHBY,
in Chancery,
before
L. HARDWICKE.

got for the same, with the approbation of the master, and all parties are to join and indorse deeds, &c. ; and let the master take an account of the rents and profits of the estate in question, which have accrued since the death of Mr. *Willoughby*, received by the plaintiff *Willoughby* the widow, or any other person by her order or for her use; and let that be applied, in the first place, to keep down the arrears of her jointure, and, in the next place, to keep down the interest upon her incumbrance ; and the money arising by sale of the real estate is to be applied, in the first place, in payment of what shall remain due to the plaintiff *Jane Willoughby* for the arrears of her jointure, and, in the next place, in payment of what shall be found due to the plaintiff *George Willoughby*, and the defendant *Martha Willoughby*, and the defendants *Anthony Pye* and *Elizabeth* his wife, and *Thomas Young* and *Jane* his wife, for the portions of the said plaintiff *George*, and of the said *Elizabeth*, *Jane*, and *Martha*, and, in the next place, in payment of what shall remain due to the plaintiff *Jane*, the widow, upon her mortgage, for principle, interest and costs, and, in the last place, in payment of what shall be found due to the defendant *Crips* upon his mortgage ; and if there be any surplus of the money arising by such sale, let that be paid to the defendant *Henry Willoughby* ; let all parties produce all books &c. and be examined upon interrogatories before the master ; and let all parties have their costs to this time (except such costs as have already been given) out of the estate ; and reserve the consideration of subsequent costs, and all further directions, till after the master has made his report.

AN
INDEX
OF THE
PRINCIPAL MATTERS.

A.

ABATEMENT.

See also REVIVOR and LEGACIES.

1. Though a cause be abated, money may be ordered to be paid out of Court without reviving the cause, upon the consent of all the parties actually interested. *Beard v. Earl Powis.* Page 387.

Sed vide ibid.

2. Annuity by will to a wife otherwise unprovided for, and sums for children's maintenance. On a deficiency of assets held on the intention of the testator that they should not abate in proportion with

the general legacies. *Lewin v. Lewin.* Page 392

3. Pecuniary legacies abate in proportion, notwithstanding a direction in the will that they are to be paid "*in the first place,*" or a direction *as to the time of payment.* If, however, an intention that any legacies are to be paid in full is to be collected, or reasonably inferred, it will be otherwise, as where a legacy is meant as a purchase of dower to which *the party is entitled.* *Blower v. Morret.* 393

ACCIDENT.

- A Decree having been made for a general account and payment
2 x 2

ment of the balance against a party who died, and his personal representative having delivered certain goods, part of the effects to her own solicitor, to be delivered over, not answerable in the event of his being robbed of them.

Tender of the goods not incumbent on her.

She would not have been answerable if they had remained in her own possession till the accident.

Jones v. Lewis. Page 351

ACCOUNTS.

1. As to opening, setting aside, *surcharging and falsifying.* *Townsend v. Lowfield.* 30
2. Bill for an Account does not lie on behalf of a master for the earnings of his apprentice, the remedy being at law. *Meriton v. Hornsby.* 39
3. A stated Account and release being set aside, relief not given to the Defendant on a Cross-Bill for another independent matter, until he should account fully in the original suit. *Shish v. Foster, et c contra.* 66
4. See *Allen v. Papworth.* 91, 92. &c.
5. Plea of a general agreement and composition of Accounts good, *without its being a minute strict settlement of items.* *Sewell v. Bridge.* Page 160
6. Relief in Account, as to payments made to a Bankrupt after a secret act of bankruptcy, when the assignees had recovered, by action, payments made by the bankrupt. *Billon v. Hyde.* 167
7. Stated Accounts set aside, the items being very gross, and obtained from a person just come of age, under a misrepresentation, &c. The party (a solicitor) charged with interest on monies directed to be laid out for the infant's benefit, notwithstanding a deed from its *grand-mother that he should not be so chargeable.* *Brown v. Pring.* 192
8. Plaintiff a factor abroad, having exceeded the price limited for a purchase of hemp, the Defendant, who objected to the contract but afterwards re-shipped and disposed of some of it on a new risque, was ordered to account for the whole at the cost price. *Cornwall v. Wilson.* 225
9. If merchant keeps an Account current by him two years without objection, it is *considered as a stated Account.* *Tickel v. Short.* 350
10. In directing Accounts where there has been usury, extortion,

tion, or oppression, the Court often, by its Decree, *directs every thing doubtful to be taken most strongly against the person guilty of such proceedings.* *Mitford v. Featherstonhaugh.*

Page 399

11. Length of time how far a bar to an Account in Equity.

412

Though stale Accounts are discouraged, yet an administrator, *who was to see to the execution of a trust* out of real estate, and was accountable for the amount, was not allowed to take advantage of the length of time elapsed. *Earl Pomfret v. Lord Windsor.*

411, 412

12. After a Decree for an Account in a suit by parties interested in the surplus, where due proceedings take place between the Plaintiffs and Defendants, there is no occasion to give notice to creditors. *Costs* having been given here, in the first instance, they were *to be paid before debts, &c.* *Hare v. Rose.*

435

13. Difference between where there is an open general Account, and where a party has leave given only to surcharge and falsify. In the latter case the burthen of proof lies on the party having such liberty. The Court will, however, admit a greater latitude in cases

of surcharge, &c. as between guardian and ward, and others, where one party is conusant of the Accounts, and the other is not, than it allows where the parties are on equal terms. *Pitt v. Cholmondeley.*

Page 438

14. Bill lies for an Account of Tolls, after an establishment of the right at law. 449
15. Though the Court decreed specific performance of an agreement to let the Plaintiff into a trade, it refused to direct an Account of the profits from the time the Plaintiff ought to have been admitted, his remedy for that having been at law. *Anonymous.* 452

ACCUMULATION.

See also RENTS and PROFITS.

1. Under a bequest of the residue of a personal estate to *A.* if he attain 21, the profits will accumulate. *Trevanion v. Vivian.* 397
2. See *Bullock v. Stones.* 419

ACT OF PARLIAMENT.

Purchaser for valuable consideration, without notice, is not bound by a Private Act of Parliament. 412

ADMINISTRATION-BOND.

Real assets followed under Administration.

ministration-bonds by legatees. Creditors have no such right. *Ashly v. Bailie*.

Page 382

ADVANCEMENT.

Personal presents no Advancement so as to bar a customary share, or share under the Statute of Distributions (1 Ves. 17). Nor is maintenance in the case of parent and child, even (as it seems) *after* marriage. *Elliot v. Collier*. 17

AFFIDAVIT.

1. No relief in Equity on a lost [legal] instrument, without an Affidavit of the loss, and offer of indemnity. *Walmsley v. Child*. 171
2. The Affidavit to ground a writ of *Ne Exeat Regno*, must not only state that the Defendant is equitably indebted in a specific sum, but must mention the facts on which it arises, &c. *Anonymous*. 414

AGENT.

The Agent of a party having notice of incumbrances, &c. induces a necessity for that party to make all due enquiries, &c. as to the title; and such person cannot afterwards protect

himself by procuring the legal estate. *Maddox v. Maddox*. Page 46

AGREEMENT.

See also CONTRACT.

1. Plaintiff in a Bill for specific performance, not being able to substantiate the Agreement thereby stated, is not allowed to resort to a different Agreement proved, or set forth by the Defendant. 5
2. One, reasonable in itself, and to settle family disputes, not set aside because the party was intoxicated on its execution, no undue advantage having been taken. *Cory v. Cory*. 19
3. Specific performance of agreement decreed against one who, after entering into it, became a lunatic. *Owen v. Davies*. 61
4. Specific performance of agreement refused under the circumstances from inadequacy of the consideration. *Underwood v. Hithcor*. 151
5. Lands agreed to be purchased, pass by general words in a will, such as "or elsewhere." *Potter v. Potter*. 202
6. Specific performance of articles executed in England, concerning boundaries of lands abroad. *Penn v. Lord Baki-more*. 205

As

- As to agreements to settle disputes, even if it afterwards appear that one of the parties had no title. Page 205
7. As to admission of parol evidence, where fraud or surprize. *Baker v. Paine.* 210
8. Bill for specific performance of a *written* Agreement, and parol evidence read of a variation from it; which being proved, the bill dismissed with costs, the Plaintiff not being allowed to resort to the substantial agreement thus proved on the part of the Defendant. Parol evidence admitted to *resist* a claim, or *rebut* an Equity, though inadmissible to establish a demand. *Legal v. Miller.* 367
9. The Defendant having entered into a written agreement "*to leave by his will,*" to a woman he had lived with, the value of the rents he had received from her estate, subject to specified deductions, an account was *forthwith directed*, with a declaration that the balance in her favour was to be considered as a debt due from the Defendant, *payable after his death.* *Rattrey v. Darley.* 394
10. Though the Court decreed specific performance of an Agreement to let the Plaintiff into a trade, *it refused to direct*

an account of the profits, from the time the Plaintiff ought to have been admitted; his remedy for that having been at law. *Anonymous.* Page 452

AGREEMENT (PAROL.)

11. Plaintiff having prevented the fulfilment of a parol Agreement, of which he had notice, not allowed to take advantage of the Statute of Frauds. Evidence of such Parol Agreement was therefore admitted against him. *Scott v. Merry:* 3
12. As to parol evidence being admitted in favour of *Defendants*, to rebut an Equity, where it could not be *the foundation of a demand in a Plaintiff.* 367

AGREEMENT (PARTNERSHIP.)

13. Mutual credit under Partnership Agreement. *Welford v. Bezely.* 6 and 7.
Vide antea, pl. 10

ALIEN.

The legal disability of an Alien to hold lands, neither a penalty, nor forfeiture. *Attorney-General v. Duplessis.* 366
See ANSWER. PRACTICE, 6. &c.

ANNUITY.

ANNUITY.

1. Redeemable Annuities for the life of grantee, secured by terms for years, taken in satisfaction of a debt, held part of the grantee's personal estate, and similar to mortgages. *Longuet v. Scawen*. Page 191
2. Annuity in fee granted by king Charles II. out of Barbadoes duties, is not a rent, nor realty; nor within the statutes either of frauds, or de donis, &c. Therefore being settled on A. "and the heirs of her body," it was held to amount to a *fee simple conditional at the common law*, the remainder over being void; and that A. having had issue, might bar the possibility of reverter. *Earl of Stafford v. Buckley*. 340

ANSWER.

See also PLEADING.

1. No Decree in Equity on the testimony only of one witness, against a *positive* denial by answer, uninfluenced by other circumstances. 50
2. Improved practice as to putting in a *supplemental Answer* on new matter discovered, instead of amending the one on the record. 425

APPOINTMENT.

See also POWER.

1. As to illusory appointments see in *Maddison v. Andrew*. Page 45, &c.
2. Appointment pursuant to a power, good, though executed by will of a feme covert. *Burnet v. Mann*. 88
3. In the exercise of a power to appoint amongst children, each must have a part, not illusory, nor reversionary; but a particular interest, as for life, may be given to any. Such a power will not extend to grand-children, nor can a discretion be given to another to make the appointment. Though such an attempt would be void, *it would not devolve on the Court to appoint*. The Court only interferes, where the power is well created, but by accident cannot be executed at all. *Alexander v. Alexander*. 456

Where given to those not capable, together with another who is capable, the latter will take the whole. Under such a power it cannot be given free from the debts of the appointee. Ibid.

APPORTIONMENT.

1. As to Contribution and Apportionment

portionment towards renewals of leases. *Verney v. Verney.*

Page 199

2. A sum devised to be laid out in lands in England, in trust for A. with remainders over, was by Act of Parliament secured on A.'s estate in Scotland, during his minority. A. attained 21, and became a lunatic. Held it might be called in, and laid out, pursuant to the trust, and that it was to be considered as if it were a real estate in England; the interest thereon, however, to be considered as *personal* estate in England. The Master was ordered to settle a rateable proportion for the Lunatic's maintenance, and his debts, between the real and personal estate in England and those in Scotland respectively. Another sum in the Exchequer in England, arising from the sale of heritable jurisdiction in Scotland, considered as real estate in Scotland. *Marq. v. Marchioness of Anandale.* 385

3. Tenant for life of lands to be purchased with S. S. Annuities, dying in the middle of a quarter, no apportionment of the dividends in favour of his representatives. *If the land had been purchased*, there would be no apportionment in such a case; and there is no appor-

tionment on dividends in the public funds. *Wilson v. Harman.* Page 461

ASSETS.

1. Assets not marshalled in favour of a charitable bequest void under the Mortmain acts. *Arnold v. Chapman.* 74
2. Assets marshalled in favour of a claim arising upon a breach of trust. *Coxe v. Bateman.* 269
3. Assets not marshalled in support of a devise contrary to law, as a devise of lands, &c. to a charity. *Mogg v. Hodges.* 284
4. Real assets, followed under administration bonds, by legatees—Creditors have no such right. *Ashly v. Baillie.* 382
5. Annuity by will to a wife otherwise unprovided for; and sums for children's maintenance. On a deficiency of assets, held on the intention of the testator that they should not abate in proportion with the general legacies. *Lewin v. Lewin.* 392
6. As to whether residuary legatees paid by executors shall refund to legatees who were not paid immediately. *Moore v. Moore.* 445, 446

ASSIGN-

ASSIGNMENT.

What is requisite to make a valid Assignment of debts. *Ryal v. Rowles.* Page 176

ATTORNIES.

See also SOLICITOR and CLIENT.

1. Objections as to their examination as witnesses. 47
2. Notice to an Attorney of any matter in the same cause, or affair, is notice to the client or party. *Le Neve v. Le Neve.* 49
3. An Attorney not disclosing an incumbrance to the buyer of an estate, and leading him to suppose the title would be a good one, held liable to make satisfaction in default of the vendor. *Arnott v. Biscoe.* 69
4. Gift to an Attorney, after the cause was over, without proof of any thing improper, not set aside. It would have been otherwise, if before the cause, as in contemplation of it; or during its progress. *Oldham v. Hand.* 956

AWARD.

1. The result of a reference under an Order of the Court, is viewed by the Court as a Decree; and even stronger, since it was held to supersede all errors, but

corruption, or partiality. *Travers v. Earl of Stafford.*

Page 270

Quære, however, whether it would supersede a clear mistake in Law. Vide *ibid.*

2. Award made by two arbitrators out of three, through the unjust exclusion of the third by one of the others, set aside with costs, to be paid by that person, and the material parties in favour of whom it was made. *Chicot v. Lequesne.* 372

B.

BANKRUPT.

1. Representatives of partner entitled to set off debts and have all allowances before the separate creditors of the other can take his share; and they have a lien for such demands. *West v. Skip.* 135
2. Relief in Account, as to payments made to a Bankrupt after a secret act of bankruptcy, when the assignees had recovered by action payments made by the bankrupt. *Billon v. Hyde.* 167
3. Pawnees of goods, &c. permitting Bankrupts to continue

- tinne in possession, or in the order and disposition of them, have no specific lien on them against the assignees. *Ryall v. Rowles.* Page 176
4. What is requisite to make a valid assignment of debts. *ibid.*
- Equities, as between solvent partners and the bankrupt's estate. 177
5. A mere power unexecuted by a Bankrupt does not vest in his assignees. *Lord Townsend v. Windham.* 254 &c.
6. A Deed may be evidence of an act of bankruptcy though made in favour of creditors. *Clavey v. Hunt.* 269
7. One of two debtors becomes a bankrupt, and the creditor proves his whole debt under the commission, but no dividend made. That creditor, though he receive a composition from the other debtor, may still receive a dividend upon his whole debt as proved, till he obtain 20s. in the pound. It would have been otherwise if he *had received* a dividend before the bankruptcy. As to the equity of sureties who have paid the demand of a creditor who has proved, or is entitled so to prove under a commission; and their present remedies by statute 49 Geo. III. c. 121. s. 8. *Ex parte Wyldman.* 308
8. Certificate allowed, notwithstanding a suspicion in the Court as to the view in taking out the commission. Former practice of traders in Ireland coming over and contracting debts in England, where they procure commissions of bankruptcy to be taken out against themselves by collusion. *Ex parte Williamson.* Page 354
9. Mortgage of a ship at sea good in bankruptcy, notwithstanding the statute of Jac. I. if the party procures the bill of sale, &c. Contrà, if he is inebriated or negligent; as by suffering the ship to come back, and go on another voyage. *Ex parte Mathews.* 363
10. Injunction untill hearing, to restrain an action by a bankrupt against the assignees under his commission, upon the ground of his long acquiescence under the commission. *Flower v. Herbert.* 374
11. *Exceptions* to a certificate from Commissioners of Bankrupt.—Jurisdiction of Commissioners of Bankrupt in matters referred to them.—When accounts, &c. are referred to Commissioners of Bankrupt, their jurisdiction and proceedings are *analogous to accounts taken before a Master in a suit in Equity*, and also to that of Auditors

Auditors under the old Action of Account at Law. In the case of exceptions to the report of a Master, or the certificate of Commissioners, they must be founded on *objections* made before the Master, or Commissioners. If the Master, &c. *varies his report*, &c. *on the objections*, the *other party* may except as to such parts, though the exceptant be not strictly warranted by the objections.—Commissioners, as well as a Master, may proceed *ex parte*, if the parties will not attend. *Ex parte Bar.*

Page 386

12. Assignees of a Bankrupt are not compellable to pay what is really due on a transaction attended with usury *under the general jurisdiction in bankruptcy*. It is otherwise where they apply to a Court of Equity by a Bill to be relieved. *Ex parte Skip.*

392

13. In the case of common personal annuities, after a bankruptcy, a value is set upon them, and a dividend paid in respect of the sum thus ascertained. But where there has been a decree for payment of the arrears, and for placing out a specific sum to secure the growing payments, the annuitant will still have a right to have the sum placed out; and if the dividends are not suffi-

cient, the remainder must be made good out of the capital, to be raised by sale from time to time. *Ex parte Artis.*

Page 415

14. A creditor receiving money, or bills of exchange, after an act of bankruptcy, but without notice of it, was protected in retaining it by statute 19 Geo. II. c. 32. *Hawkins v. Penfold.*

428

BARGAIN (IMPROPER.)

See ATTORNEY and CLIENT, EXPECTANCIES, FRAUD, GUARDIAN and WARD, INFLUENCE UNDUE, *Post obit.* SEAMAN.

Sale of a seaman's prize-money, and subsequent agreement in confirmation, set aside. *Taylor v. Rochfort.*

365

BARON AND FEME.

1. Executor of husband who survived his wife, but did not take out administration, is entitled to the wife's share, under the custom of London; and her administrator held to be a trustee for him. *Elliott v. Collier.*

17

2. Order made on a wife living separate, and her husband's offer to receive her again. *Head v. Head.*

17

3. Wife, surviving her husband, bound

- bound by his *covenant* as to a chose in action, which became a vested interest during his life-time, and which he therefore *might have disposed of*. *Bush v. Dalway*. Page 20
4. Appointment pursuant to a power good, though executed by will of a feme covert. *Burnet v. Mann*. 88
5. Bill in Equity by husband and wife, submitting that her separate property should be applied in payment of his debts, and followed up by a decree, held *tantamount to an actual appointment of it*. *Allen v. Papworth*. 91
6. As to whether a surrender of copyholds by a feme covert *alone* is good, her husband having been present and privy to it. *Taylor v. Philips*, 124 [mispaged 224] 125 and 272
7. A husband covenanting before marriage, to settle lands in jointure for wife, and other part for the issue of the marriage, her fortune to remain in trustees till such settlement made. The husband dying insolvent without performing it, the wife's fortune survives for her own benefit, and the issue not entitled to take it from her. *Pyke v. Pyke*. 177
8. Husband being abroad, a wife having appeared, and obtained an order to answer separately, whereby she freed herself from process of contempt, will not be allowed to have her own acts set aside. *Travers v. Bulkely*. Page 180
9. The whole line of process having been gone through against the Plaintiff's husband, who had not appeared, is equal to the proceeding to outlawry at law, and there may be a Decree for transfer of her separate property against the other Defendants, who did appear. *Vanessen v. East India Company*. 181
10. Husband of tenant in tail takes in a mortgage, and is in receipt of the rents and profits. On a bill to redeem by the reversioner, after the wife's death, no interest allowed to the husband during his wife's life time. *Amsbury v. Brown*. 213
11. Purchase from a wife of part of her separate estate, without her trustees joining; with a covenant by the husband that it was free from incumbrances. *There being no proof* of the husband's improper influence, *although it was alleged* the purchase was effected; but as to the husband's covenant, the wife held not bound, and there being an incumbrance, the Plaintiff's remedy

remedy was against the husband alone. *Grigby v. Cox.*

Page 229

12. A husband receiving the proceeds of a sale of wife's estate, and promising by a note or receipt to lay it out, pursuant to trusts relative to other property; this note held evidence of the agreement antecedent to the sale, and estates purchased afterwards by the husband, were held to be bound. *Attorney General v. Whorwood.* 247

13. A wife not entitled to paraphernalia against creditors, when her husband dies indebted. The Court, however, will let her in, on other funds, if any.

A wife can only claim as a creditor, one year's arrear of her separate estate, as in the case of pin-money. *Lord Townsend v. Windham.*

254, 255

14. Settlement after marriage, on wife, &c. good against the husband's creditors and assignees, having been made in consideration of her parting with a contingent interest, secured by the bond of the husband to her before the marriage, without the interposition of trustees. *Ward v. Shallet.* 268

15. As to a surrender of copyhold estate by a Feme Covert,

with her husband's privity and consent, *but without his having actually joined in the act.* *Taylor v. Philips.* Page 272

16. Conditional Decree. A wife, having an equitable interest in a customary estate of small value, her husband on a family arrangement, receives a comparatively large sum for the relinquishment of their rights. An intermediate suit having been instituted, the husband and wife in a joint answer disclaimed all interest; and in that suit there were no further proceedings. The present bill being filed a long time afterwards, the husband and wife again put in a joint answer, *claiming the estate in the wife's right.* The Court could not make any personal Decree on the wife; and could only direct the husband to account for the 200*l.* he had received, with costs, in case he did not join, *and procure his wife to join, in the proper assurances.* This 200*l.* having been paid by the wife's father by way of exonerating *his real* estate from a supposed entail, was held to belong to *his grantee of that estate*, and not to his personal representative. *Sedgwick v. Hargrave.* 285

17. Election to be made by a Feme Covert resident abroad, cannot be effectuated under a Power

- Power of Attorney, &c. from the husband and wife, or any thing short of a commission, or as near thereto as possible. *Parsons v. Dunne.* Page 291
18. Will by Feme Covert good, and proveable in the Ecclesiastical Court, if made with assent of her husband. 294
19. Wife, having specific effects to her separate use, disposes of her separate property by will. After her death, her husband sells part of these effects, and dies: his representative is accountable to the wife's administratrix with the will annexed. Account of wife's separate estate or pin-money never carried back beyond the year. A wife may dispose of her separate *personal estate* by act in her life time, or by will. *As to her real estate*, all that is not *properly conveyed* descends to her *heir*; and no part of it is bound by *any bare agreement*, in so far as respects her *heir*.
- As to the execution of powers by Femmes Covertes.
- Said, that if a Feme Covert borrows money on the security of her separate estate, her declarations, as such debtor, may be read in evidence. *Peacock v. Monk.* 342
20. Bond by a woman about to marry, *without her intended husband's knowledge*, but for

- valuable consideration* in respect of an antecedent debt. Held, the husband could not be relieved against it. Concealment, however, of such securities and debts not to be encouraged. *Blanchet v. Foster.* Page 357
21. Where a suit is relative to the separate estate of a wife, the bill *ought* to be filed by her *prochein amy*. If, however such a suit be *instituted* by the *husband and wife* jointly, the Court will secure the fund for the wife, in the name of trustees, or the accountant general. *Griffith v. Hood.* 403
22. Husband suing for the wife's property, must make a settlement. If he is out of the jurisdiction, or otherwise leaves his wife unprovided for, the Court will order payment of the interest to the wife, till he returns and maintains her properly. *Sleech v. Thorington.* 437
22. The Court refused to let the *whole* of a wife's fortune be paid to her husband, *although she was present in Court, and consented to it.* *Ex parte Higham.* 441
23. Though a settlement be made on a wife before marriage, if a great accession of fortune happen to the wife afterwards, the Court will direct a further

a further settlement out of it, if it once obtain jurisdiction. *Tomkyns v. Ladbroke.*

Page 444

24. A wife barred of all claim as to her separate estate by her own acts, in concurrence with the trustee and her husband in his life-time, and by her affirmation afterwards. *Pawlet v. Delavel.*

459

25. The Court refused to pay a wife's money to her husband, though she consented in Court, and had no children; *proposals having been formerly made to settle an equivalent in strict settlement, but which the parties wished to abandon.* *Ex parte Gardner.*

460

26. As to the wife's choses in action, not reduced into possession. *Garforth v. Bradley.*

439, 461

BASTARD.

Question, as to, whether a bastard could take under the denomination in a will, of "*eldest son*," by way *descriptionis personæ*, the testatrix knowing of his existence, and believing that there was no lawful issue. *Baker v. Baker.*

337

BONDS.

See also POST OBIT BONDS.

1. Bond *ex turpi causâ*, decreed

to be delivered up. *Robinson v. Gee.*

Page 139

2. As to the antient and established jurisdiction of Courts of Equity on lost bonds; and the *modern assumed* jurisdiction of the Courts of Law in such instances, without profert.

Walmsley v. Child. 171. See

also *Whitfield v. Fawcet.* 180.

Glynn v. B. of England. 281.

Askew v. Poulterers' Company.

299

3. Assignment of Bond to co-obligor, who pays it, is of no use; since even the principal may plead payment to an action in the name of the obligee. Action, however, lies on the case, and perhaps *indebitatus assumpsit* *Woffington v. Sparks.*

440

C.

CASE FOR A COURT OF LAW.

Where an estate, subject to a *question of law*, is of small value [and a Court of Equity does not think proper to decide it], the Court will direct a case to be argued and heard before two Judges at Chambers, instead of being set down in

in the *mocial* paper of the Court at Law. *Rigden v. Vallier*.

Page 355, 356

CHARGE.

See also EXONERATION.

1. Incumbrances of an ancestor not a primary charge on the son's personal estate, although the latter had entered into a covenant to pay them.

Leman v. Newnham. 40

2. Under a "devise that all testator's [debts " *should [be first paid and satisfied,*" Held that a customary estate surrendered in trust for several persons, and for the use of such as the testator should appoint, was subject to the testator's debts; the first disposition running over all.

§ *Earl of Godolphin v. Penneck.*

361

3. Charge by will of the whole real estate in aid of personal for debts and legacies, not restrained by the subsequent devise of a particular part for that purpose, without negative words. *Elliston v. Airey.*

439

CHARITIES.

See also MORTMAIN.

1. Though an information relative to a charitable use will not

be dismissed on any formal grounds, where a clear right is to be settled, it will yet be dismissed with costs, if no charitable funds in question, and no distinct ground made out in the proof for the Court's interference. *Attorney General v. Parker.* Page 36

2. Though an information relative to a charity, *where the subject is fit, and the Court has proper jurisdiction,* will not be dismissed because it prays *wrong relief, &c.* it is otherwise in many cases where the Court may not think proper to interpose; and an information will always be dismissed with costs, if the Court has not properly full jurisdiction, as in foundations under a charter, &c.

Attorney General v. Smart. 53.

See also pl. 9 and p. 374

As to the late Act for the regulation of charities on petition only, see p. 53.

No precise words requisite to constitute a visitor. 58, 60

3. The nomination of a master to a charity school, not subject in the general rules of lapse, *as in cases of presentations to livings.* *Attorney-General v. Wycliffe.* 61

4. As to where the Courts have favoured valid bequests and donations for charitable purposes. 122 [mispaged 222]

2 L

5. Void

5. Void devise under the Mortmain Acts. *Durour v. Mot-teux*. Page 165
6. *Disusage* held evidence of abandonment by consent, as to part of a constitution, which arose from consent. *Attorney-General v. Scott*. 194
7. Devise of a house to a college, not for academical or collegiate purposes, but merely to make it unalienable, held void. *Attorney-General v. Whortwood*. 247

Rights of the Crown to direct the use of a charity contrary to law; or where the purposes expressed are too general and indefinite. 247

8. Assets not marshalled in support of a devise contrary to law, as a gift to a charity.

Money directed to be laid out in lands for such an illegal purpose, shall not be laid out for the heir, but the trust is void altogether.

As to the testatrix's real estate, which was devised to be sold, partly, for such purposes, the heir was declared entitled to the surplus proceeds. *Mogg v. Hodges*. 284

9. A free school founded by charter, with proper powers, must be regulated in the first instance by the charter, not by application to a Court of Equity.

No formal words necessary for the appointment of a visitor, but the visitorial power not to be extended.

The rule that an information for a charity is not to be dismissed, if the party has failed to pray the proper relief, holds only in those cases which the Court thinks proper for its interference at all, and the information here being improper, was dismissed with costs. *Attorney-General v. Middleton*. Page 374

10. Lord Hardwicke's opinion in the latter part of the Judgment, has been over-ruled, and the term "erecting," as applied to charities, is now held to mean the substantial part of the gift, not the mere building of any tenements. *Attorney-General v. Bowles*. 426

11. Where trustees of a Charity have discretionary powers, the Court will not interpose unless they act corruptly.—Though it may not chuse to interpose, it does not follow that an information, seeking the Court's interference, will be dismissed; since it may be serviceable to maintain a controul over them.

Where there is, in point of substance, a visitor, it excludes the general interference of the Court,

Court, either by commission within the 43 Eliz. or its ordinary jurisdiction. *Attorney General v. Governor of Harrow School.* Page 429

CHATTEL.

Entail of.

See ESTATE TAIL.

CHOSE IN ACTION.

See also **BARON and FEME.**

1. Wife, surviving her husband, bound by his *covenant* as to a Chose in Action, which became a vested interest in his life-time; and which he therefore *might have disposed of.* *Bush v. Dalway.* 20
2. Neither Choses in Action, or securities for money, pass under a bequest of "*goods and chattels.*" *Chapman v. Hart.* 146

CLERK IN COURT AND SIX CLERKS.

1. Voluntary release by a party to his adversary not to defeat the Clerk in Court of his lien for costs. If the suit had ended on a *bonâ fide* compromise for a reasonable consideration

paid, it would have been otherwise. *Anonymous.*

Page 275

2. As to rights and remedies of Six Clerks and Clerks in Court, for their fees; their lien on papers, &c. Whether Six Clerk can stop proceedings until paid his fees, which had been paid to the Clerk in Court of his division, who had absconded. *Taylor v. Lewis.* 307

CODICIL.

See also **REVOCATION, &c.**

See Fuller v. Hooper. 352

CONDITION.

1. A person having power to appoint 4000*l.* to *any of her kin*, and for want of appointment, to go according to the statute, appointed it to her nephew, "*upon condition*" that he paid his mother (one of the next of kin) an annuity. Though the nephew died in her lifetime, whereby the appointment, *as to him*, became void, his mother held entitled to her annuity. *Oke v. Heath.*

84

An ulterior appointment to a niece of *all the rents &c. of what*

what she had power to dispose of, held to pass the residue of the above sum which had thus lapsed. Page 84

2. Gift on condition to marry with consent, where good, and where only in terrorem. *Berkeley v. Ryder.* 424
3. Provision by a brother in favour of sisters, otherwise unprovided for, "upon their marrying with consent," construed as if made by a father.—such a provision, *aliter*, if made by a mere stranger. *ibid.*

CONDITIONAL LIMITATION.

Devisee on condition that the land should go over to another if he did not give a release in three months after the testator's death, dying in the testator's life-time, the devisee over shall take instead of the heir at law; this being a conditional limitation, and not a strict condition. *Avelyn v. Ward.* 195

CONFIRMATION.

Sale of a seaman's prize money, and subsequent agreement in

confirmation of it, set aside. *Taylor v. Rochfort.* Page 365

CONSENT.

Decree by consent refused to be set aside, *Harrison v. Rumsey.* 413
Vide *contra*, however, *Butterfield v. Butterfield.* 83

CONSIDERATION.

1. A good and valuable consideration in settlements, &c. will run through *all* the limitations in favour of the remotest remainder-men. *Stephens v. Trueman.* 54
2. The consideration, as between the immediate parties to marriage settlements, will pervade all the limitations for the benefit of the remotest, and for those, in respect of whom, the debt would *otherwise* have been voluntary. *Ithell v. Beane.* 119
3. Settlement after marriage, if a portion paid, is on good consideration, and equal to one made before marriage. *Ramsden v. Hylton.* 369

CONSTRUCTION.

CONSTRUCTION.

1. Of will as to *real* estate, made by reference to directions concerning the *personalty*. *Hawes v. Hawes*. Page 15
2. "Or," substituted for "and," to effect the plain intent. 20
3. A sale directed in *favour* of creditors, on a devise of "*rents and profits*" alone, and although contrary to the testator's intention: held otherwise *as to legatees*, under the same instrument. *Baines v. Dixon*. 35
As to the *natural and primary* meaning of such directions, *per se*.
Vide Page 35, &c.
4. Construction of a trust as to surplus rents: held these were not included under the term "*Portion*." *Vane v. Vane*. 45
5. The word "Relations," *generally* speaking, does not include those by *affinity*. A wife, therefore does not answer such a description in the ordinary sense. See *Davies v. Baily*. 68, 64
6. Bequest by an East India Captain of "all household furniture, linen, plate, and apparel," includes only what is for domestic use, and not any articles for trade or merchandize. *Le Farant v. Spencer*. 70
7. Medals, when to pass by a bequest of money &c. Page 70
Construction as to the words "or" and "and." *ibid*.
8. The word "Grant" does not amount to an entire warranty in Equity; nor always at law, as *where particular covenants are inserted*. *Clarke v. Samson*. 71
9. Construction of Deed—grandchildren and great grandchildren included by the term "*issue*;" and the word "*children*," following it, explained as meaning "*issue*," *likewise*.
Wyth v. Blackman. 113
10. *After born children* included in a devise to *A's children*.
Goodwyn v. Goodwyn. 123
[mispaged 223]
What passes by the term "*Estates*," either alone, or with the addition of other words.
ibid.
11. Bequest "to such of nearest *relations*" as A. should think poor, and "objects of charity," confined to those within the statute of Distributions, under A's advice. *Goodinge v. Goodinge*. 128
12. Construction of will—Interest of legacy *from the death of the testator* on the manifest *intent as to maintenance*. *Beckford v. Tobin*. 161
13. Devise of real and personal estate in trust for the nearest relation

- relation "*of the Pyots.*" The latter held to be "*nomen collectivum,*" and descriptive of that particular stock, and that this mixed fund should not go to the heir at law of that name. A change of the name of Pyot, by marriage, held not to exclude. *Pyot v. Pyot.* Page 169
14. *Second born son* may take under a limitation "*to the first son,*" he being so at the time. *Lomax v. Holmden.* 160
15. Devise of "*all lands and tenements in or near F.* by a will attested by only two witnesses, where the testator had freehold, will not pass leasehold. It would have been otherwise if he had only had leaseholds. *Chapman v. Hart.* 146
16. Power of appointment, by a father not well executed according to a reasonable construction of the recital of the deed which created the power. *Burleigh v. Pearson.* 151
 "*And*" construed "*or.*" 151
17. "*Or*" construed "*and.*" 192
18. Courts of Law and of Equity will equally transpose words in instruments to make the limitations intelligible, and attain the party's clear intent; but never to defeat the interests given, or let in more than expressed. 294
19. Younger son becoming an eldest, entitled to take *eo nomine.*
- Devise of house and appurtenances to wife during widowhood; but that the eldest son when 21, or married, might have it, on notice.—The wife having married after the death of a former eldest son unmarried, and during the minority, &c. of the existing eldest son; it was declared that he would be entitled to the enjoyment on attaining 21, or marriage, upon giving notice. The *intervening interest* in the premises and appurtenances, being undisposed of, held to fall into the residue of the real and personal estates respectively. *Duke of Bridgewater v. Egerton.* Page 313
20. An express estate for life not enlarged by implication, unless necessary; as to preserve the clear intent for a line in succession. The words "*dying without issue,*" construed in respect of *personal* estate, in the popular sense; so as to preserve the limitations over. *Vaughan v. Farrer.* 341, 342
21. Repugnant words in a will may be rejected or transposed. In this case the Court rejected a repugnancy by interlineation. Bequest of the use and enjoyment "*of every thing else at my house,*" means such things as are

- are proper to go *with the house as heir-looms, viz. fixtures and ornaments, not watches, &c.* Estate for life in lands, by implication, rebutted by the party having a bequest for life *in a particular part of them*, and by testator desiring she should not be turned out.
- Boon v. Cornforth.* Page 364
22. A general release with a particular consideration recited, will be construed according to the particular recital. *Ramsden v. Hylton.* 369, 370
23. Wills construed to charge real estates by implication for the benefit of creditors: such implication, however, may afterwards be destroyed. *Thomas v. Britnell.* 372
24. After a bequest before the Mortmain Act of 50*l.* charged on land to P. J. *the minister of a Baptist meeting-house* certain other premises were devised away, charged with an annuity of 10*l.* "*to the minister belonging to that meeting-house;*" this held a valid charitable bequest for the ministers *in succession*, and not personal to P. J. *Attorney General v. Cook.* 363
25. Covenant in marriage articles that lands were of a certain value, which they were not: husband by will "*confirms the articles, and also gives his wife all his lands in A. B. for life.*" Held not to be a question of satisfaction, or part performance, but of construction; and that the wife was entitled to both interests under the intent thus collected. Further covenant from the husband, "*inasmuch as he was to be absolutely entitled to all the wife's personal estate,*" to settle "*in respect of any sum that might come to her afterwards after the rate of 100*l.* per annum on her for life, for every 1000*l.*; and, upon certain contingencies, that she should be paid back a moiety of all that he should receive as her portion.*" The husband obtained a *Decree* for 400*l.* of the wife's money, but did not receive it: held, she was entitled to a settlement according to that proportion; and the contingencies having happened, to the moiety likewise of all sums received, including the 400*l.* since the husband might have received it. *Prime v. Stebbing.* 390, 391
26. Annuity by will to a wife, otherwise unprovided for; and sums for children's maintenance. On a deficiency of assets; held, on the intention of the testator, that they should not abate in proportion with the general legacies. *Lewin v. Lewin.* 392
27. Arrears of annuity held to pass under a bequest of "*all arrears of rent and interest due.*" China

China held to pass under a bequest of "*furniture.*" *Storetea* contra. *Hele v. Gilbert.*

Page 397, 398

28. Devise of real and personal estate to the first son of A., when he shall attain 21, with a direction for his proper maintenance and education. A. having no son at the time of the will, the testator's death, or the decree; held that the profits of the personal estate should accumulate; that as to the real estate, it was a good executory devise, but that the profits thereof descended to to the heir until a son should be born, when they should be applied to his maintenance, &c.

Devise of all real and personal estate "in trust" by "B. C. D." &c. must be construed by the subsequent acts to be done by them, and amounted here to a devise "to" them. *Bullock v. Stones.*

419

29. Bequest to "*near relations,*" mean those within the statute of distribution. *Whithorn v. Harris.*

423

30. Bequest "to the two servants" that should live with the testatrix at her death: she had *three* at that time, and all of them entitled. *Sleech v. Thorington.*

437

CONTEMPT.

Publisher of advertisements as to proceedings in Court committed for a contempt, but discharged on his submission and full disclosure. *Anonymous.*

Page 418

CONTINGENCY.

1. Bequest of a contingent interest in personalty *void*, where the preceding gift never vested, owing to a lapse. *Miller v. Faure.* 64
2. The Court will not direct money to be paid to a party entitled in remainder, upon the *improbability* of an intermediate event, *if such event be possible.* *Kirby v. Clayton.* 351

CONTINGENT ESTATE.

An estate being devised to R. "*or his heir,*" on a contingency, and R. having conveyed all his right, title, &c. *before the contingency happened*, and then died, his heir has no claim. *Wright v. Wright.* 192

CONTINGENT REMAINDER.

See also REMAINDER.

1. Contingent remainder upon an

- an executory devise. *Hopkins v. Hopkins.* Page 145
2. Questions as to legal and equitable recoveries, and trustees to preserve contingent remainders. *E. Portsmouth v. Lord Effingham.* 201

CONTRACT.

See also AGREEMENT.

1. Though specific performance of a contract might have been decreed against original parties holding as tenants in common; yet where an alteration prevented a decree as to one moiety, the Court would not direct a performance as to the other, the contract being entire, and an execution of half of it inadequate to its prime object. *Attorney-General v. Day.* 121
2. If a tenant in tail persists in refusing to execute his contract for sale, &c. and dies, the Court will not decree the succeeding tenant in tail to fulfil it; such a one taking paramount. *Attorney-General v. Day.* 121

CONTRIBUTION.

See also APPORTIONMENT, EXONERATION, &c.

As to contribution and appor-

tionment towards renewals of leases. *See Verney v. Verney.* Page 199, 200

CONVERSION.

See PERSONAL ESTATE, HEIR, &c.

1. Conversion of real estate into personal. *Durour v. Motteur.* 165
2. Devise of real and personal estate in trust for the nearest relation "*of the Pyots.*" The latter held to be "*nomen collectivum,*" and descriptive of that particular stock, and that this mixed fund should not go to the heir at law of that name. A change of the name of *Pyot by marriage, held not to exclude.* *Pyot v. Pyot.* 169

CONVEYANCE, VOLUNTARY.

1. A voluntary conveyance, by one, lately come of age, to an agent of a reversion of *no great value*, for a nominal consideration of 180*l.* and containing covenants, as in the case of a purchase; not absolutely rescinded, as not being a case of fraud; but the transaction modified by Decree, that the agent should release the covenant

nants at his own expence, and recite the impropriety of them as referable to a gift. [*Sed quære.*] *Cray v. Mansfield.*

Page 178

2. See titles CREDITORS, and PURCHASERS ; and *Lord Townshend v. Windham.* 254, 255, &c.

COPYHOLDS.

See also SURRENDER, &c.

1. Wife barred of *free-bench*, by settlement under agreement before marriage, to accept it in lieu of dower, or thirds. *Walker v. Walker.* 43
2. Surrender supplied in favour of younger children. *Banks v. Denshire.* 48
3. Trust of a copyhold devise-able without a surrender. *Allen v. Poulton.* 78
As to another copyhold, of which the testator had the legal estate, the heir put to his election. *ibid.*
4. Devise of all testator's "*real*" and personal estate "*subject to debts,*" there being no freehold lands, affects copyholds, for the benefit of the creditors. If there had been freehold, it would have been otherwise. *Itbell v. Beane.* 119
See also *Goodwyn v. Goodwyn.* 122 [mispaged 222]
5. Devise to a Charity, before the statute of Mortmain, of copyholds *unsurrendered*, held good. *Attorney General v. Andrews.* Page 121
Copyholds pass by a will, without any witness. *ibid.*
6. Devise of "*all messuages, lands, &c.*" will pass copyholds, where the introductory words, &c. shew the testator's meaning to dispose of all his estate. *Goodwyn v. Goodwyn.* 122 [mispaged 222]
7. A person taking a benefit in real or personal estate under a will must abide by it *in toto*. Therefore an unsurrendered copyhold was decreed to pass. *Cookes v. Hellier.* 133
8. A surrender of copyholds will not be supplied in favour of a wife or child, under a merely presumable intention to devise it. *Chapman v. Hart.* 146
9. As to trusts of copyholds passing without a surrender. 215
10. A defect of a surrender of copyholds, &c. is supplied in favour of a widow, children, &c. without any statement that they are unprovided for; but it is not supplied in favour of grand-children.
It is supplied in favour of creditors, where no other real estate, under a general devise, after a direction to pay debts. *Tudor v. Anson.* 442
11. Entail of copyholds barred by

by a mere surrender to the use of a will, &c. *where no peculiar custom*, shewing the necessity of barring by recovery.

To shew a customary estate tail it is necessary to shew remainders, or such long enjoyment according to the limitation, as to *exclude the supposition of a conditional fee*. *Moore v. Moore.* Page 445, 446

12. A copyholder contracts, for *valuable consideration*, to sell his copyhold lands to his son, but dies before an actual surrender; the son held entitled to have the agreement fulfilled, and to a surrender from the widow of her free-bench. *Hinton v. Hinton.* 454

13. As to a surrender of a copyhold estate by feme covert, with her husband's privity and consent, but without his having actually joined in the act. *Taylor v. Philips.* 272

14. Testator seized of freehold, and of copyhold estates *unsurrendered*, "gives all the rest, &c. of his estate, real and personal, to his wife, her heirs," &c. Held clearly, that the *copyholds* thus unsurrendered did not pass in Equity, there being nothing to designate such *express intention*; and sufficient to answer the words used of "*real estate*" without them. It would have been

otherwise in this case, if testator had not had any freehold estate, or having both, had expressly devised both, even although the copyhold was unsurrendered. In cases where copyholds are *clearly meant* to pass, but are unsurrendered, the want of such surrender supplied only in three cases, *viz.* for the benefit of a wife, children, and creditors. Distinction between the supply of a surrender in favour of wife or children, and creditors. *Byas v. Byas.* Page 333

15. Under a devise that all the testator's debts *should be first paid and satisfied*. Held that a customary estate surrendered in trust for several persons, and for the use of such as the testator should appoint, was subject to the testator's debts, the first disposition running over all. *Earl Godolphin v. Penneck.* 361

16. Particular customs of a manor as to mortgages. Equity of redemption will follow the custom attaching on the legal estate.

Not absolutely determined, whether trust estates or equities of redemption in copyholds *escheat* to the lord. *Fawcett v. Lowther.* 368

17. Quere, whether a trustee or his heir can claim admittance to

to copyholds, or hold for his own benefit, where the cestuy qu'a trust has died without heirs.

It is a question whether trust estates in copyholds *escheat* to the Lord in such a case? *If they do*, and the trustee has been admitted, it seems he would be considered as holding for the benefit of the Lord; and decree to surrender.

If they do not escheat, the question is, *who* is entitled to the beneficial interest.

Page 368, 369

It has been *said*, a Court of Equity would decree such an estate to be sold for the benefit of the next of kin; but *that seems very doubtful*. 349

Quere, therefore, whether, in such a case, the Lord could refuse the trustee admittance, and if compellable *by law* to admit him, whether he would not be entitled to the assistance of a Court of Equity?

ibid.

COSTS.

1. Book kept at the Six Clerks' Office, for entry of bills, which have not been filed, but on which process has issued, for the benefit of Defendants, who may "*prefer costs*," after their appearance in such a suit. 42

2. Costs paid to a disinherited heir, where raising a fair question, and avoiding useless expence. *Stephens v. Trueman*.

Page 54

3. If redemption of mortgage be resisted when it should not, mortgagee will be ordered to pay costs. *Baker v. Wind*.

90

Whether costs should be given to *Particeps Criminis* who succeeds in setting aside an instrument on the grounds of public policy, query; and see *Debenham v. Ox*. 141

Where the question of mortgage or absolute conveyance had been decided against the mortgagee in an issue, he was on motion directed to pay the costs *forthwith*, and not allowed to set them off in account. 90

4. Right to principal and interest generally carries costs. A tender must be very express and formal to prevent costs in such a case. *Gammon v. Stone*. 170
5. Costs are refunded upon the reversal of an order, which had allowed a demurrer. *Oates v. Chapman*. 252, 302
6. Voluntary release by a party to his adversary, not to defeat the Clerk in Court of his lien for costs. If the suit had ended on a *bonâ fide* compromise for a reasonable consideration paid,

- paid, it would have been otherwise. *Anonymous*. Page 275
7. In passing accounts of a lunatic's estate, *notice* should be given to the parties next entitled; *but they are not allowed any costs*. *Ex parte Wright*. 275
8. The next friend of an infant allowed costs, though the bill had been dismissed; *the Master having previously reported the suit for the infant's benefit*. *Taner v. Ivie*. 407
Sed vide ibidem.
9. Revivor is allowed for costs *taxed*. They die with the party unless taxed; and even where taxed in the life-time of such party, and the person who is to pay them is in prison, he will be discharged, unless there be a revivor in a reasonable time. *White v. Hayward*. 406
10. Though the strict rule be not to allow revivor, merely for costs which have not been taxed, the Court leans against enforcing it, *if there be any thing in the Decree yet remaining to be performed*. *Johnson v. Peck*. 407
See also pl. 13.
11. The antient sum of 40*l.* as the amount in which security must be given to answer costs on the Plaintiff's residing abroad, is not increased under adverse motion, on *any special*

circumstances. If, however, such a Plaintiff asks a favour of the Court, further terms may be imposed on him. *Gage v. Lady Stafford*.

Page 434, 435

12. After a Decree for an account, in a suit by parties interested in the surplus, where due proceedings take place between the Plaintiffs and Defendants, there is no occasion to give notice to creditors. Costs having been given here in the first instance, they were *to be paid before debts, &c.* *Hare v. Rose*. 435
13. Although, *generally speaking*, costs die with the party, if they have not been taxed, several exceptions are allowed to it; and revivor may be for costs alone, under particular circumstances. *Kemp v. Mackrell*. 441
See also pl. 9, 10.

COVENANT.

See also SATISFACTION, PERFORMANCE, &c.

1. A husband covenanting to grant his wife by deed or will 1000*l.* at his death, if she survive him, but dying intestate without having done so. Held that she was not entitled to her distributive share, in addition to her claim under the covenant.

- covenant. *Lee v. D'Aranda*
[and *Cox*] Page 1
2. As to the distinction between cases of satisfaction and of part-performance, &c. 3
3. Covenant by lessee to *re-build* is not performed by repairing some, and re-building others. *City of London v. Nash.* 14
4. As to the propriety of the Court's interference in such cases. 15
5. Wife surviving her husband bound by his *covenant*, as to a chose in action, which became a vested interest in his lifetime; and which he therefore might have disposed of. *Bush v. Dalway.* 20
6. Incumbrances of an ancestor not a primary charge on the son's personal estate, although the latter had entered into a covenant to pay them. *Leman v. Newnham.* 40
7. The purchase of *houses in London, and of lands of the tenure of borough English*, held not to be a due execution of a covenant in marriage articles to purchase or settle "*lands of inheritance.*" *Pinnel v. Hallet.* 364
8. Bill, *quia timet*, A. having disposed of a specific sum, which he had covenanted should be paid to B. on a contingency, decreed to secure it. *Flight v. Cook.* 448

CREDIT MUTUAL.

Under partnership agreement.
Welford v. Bezely.
Page 6 and 7

CREDITORS.

See also DEBTOR and CREDITOR.

1. Settlement after marriage, voluntary and void against creditors. *Beaumont v. Thorpe.* 25

Contrà, if on a *fair* consideration, *though inadequate, if no fraud, or reasonable ground of suspicion.* 26

2. A sale directed, *in favour of creditors*, on a devise of "*rents and profits*" alone, and although contrary to the testator's intention. Held otherwise as to *legatees*, under the same instrument. *Baines v. Dixon.* 35
3. A deed executed on the same day as a will, held to be a testamentary act, and void against creditors. *Peacock v. Monk.* 82

4. Devise of all testator's "*real*" and personal estate, "*subject to debts,*" *there being no freehold lands*, affects *copyholds* for the benefit of the creditors. If there had been freehold, it would have been otherwise. *Ithell v. Beane.* 119

5. No preference allowed to a creditor who becomes an incumbrancer under a devisee in trust. *ibid.*
6. A

6. A daughter, being a creditor under her father, the testator's marriage articles, and having a legacy bequeathed to *very near the amount*, an account was directed as to the testator's personal estate at the *respective times of making his will and of his death*. *King v. Philips*.
Page 131
7. The grant of a menial office in the House of Lords for a term of years, liable to creditors; and a daily fee or allowance held liable also. *Schellinger v. Blackesley*. 172
8. As to a creditor being witness to a will, before the act 25 Geo. II. c. 6. *Pryse v. Lloyd*.
221
9. Voluntary conveyance by a person *indebted at the time*, void against subsequent purchasers for valuable consideration, *and creditors*. *If the party is not indebted at the time*, and no fraud, it is *good, against creditors*, though *not against purchasers*; by force of the statute 27 Eliz. c. 4. Difference between the statutes 13 Eliz. c. 5, and the 27 Eliz. c. 4. *Lord Townshend v. Windham*.
259
10. Settlement after marriage on wife &c. good against the husband's creditors and assignees, having been made in consideration of her parting with a contingent interest, secured by the bond of the husband to her before the marriage, without the interposition of trustees. *Ward v. Shallet*.
Page 268
11. A deed may be evidence of an act of bankruptcy, though made in favour of creditors. *Clavey v. Hunt*. 269
Distinction between *powers and absolute interests*. A general power of appointment given over an estate in lieu of a present interest in it, having been *executed voluntarily*, though for a daughter, was held to be assets in favour of creditors. As to these assets, however, as between the creditors, it was held that a creditor by judgment, entered into for securing a portion given by the debtor on the marriage of his daughter, was entitled unto a preference. *Lord Townshend v. Windham*. 254
12. Mere power unexecuted in a tenant for life who becomes bankrupt, does not vest in his assignees. 255
A wife not entitled to paraphernalia, where her husband died indebted. 256
13. See PARTNERSHIP, and *Pearce v. Chamberlain*. 279
14. Under a devise that all testator's debts "*should be first paid and satisfied*." Held that
a cus-

a customary estate surrendered in trust for several persons, and for the use of such as the testator should appoint, was subject to the testator's debts; the first disposition running over all. *Earl Godolphin v. Penneck.* Page 361

15. Wills construed to charge real estate by implication for the benefit of creditors. Such implication, however may be afterwards destroyed. *Thomas v. Britnell.* 372

16. Real assets followed under administration bonds by legates. Creditors have no such right. *Ashly v. Bailie.* 382

CURACY, PERPETUAL.

Directions of the Court on establishing a right to hold a perpetual curacy, and as to the nomination thereto by the patron.

The question whether a perpetual curacy or no may be judged of by these concurring circumstances.

First, whether there are parochial rights belonging to the chapel in question; *secondly*, with reference to the rights of the inhabitants within the district; and *thirdly*, as to the rights and dues belonging to the curate.—Such a curate not removeable at pleasure.

Presentation to a church or

nomination to a perpetual curacy may be by parol.

A *bill* is the proper mode of establishing a right to a perpetual curacy, &c. &c. *and not on information* in the name of the Attorney General, *except in the case of charities.* *Augmentations of vicarages.* &c. form such an exception. Costs. *Attorney General v. Brereton.* Page 396

COURTS, FOREIGN.

As to the jurisdiction of Foreign Courts.

A commission granted to examine at Paris, as to the extent of jurisdiction of a particular Court erected there; *but not as to the original constitution* of it. *Gage v. Lady Stafford.* 430

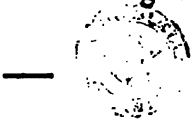
CUSTOM OF LONDON.

Personal presents no advancement so as to bar the customary share, or share under the Statute of Distribution (1 *Ves.* 17). Nor is *maintenance*, in the case of parent and child, even (as it seems) *after marriage.* *Elliot v. Collier.* 17

Orphanage Part.—

A freeman, on the same day with his will, by deed assigns part of his personal estate in trust to separate use of his daughter

daughter. He was then aged seventy-two; in the gout; and died in two days: the daughter had been married without consent; but he was reconciled. Held to be a testamentary disposition, in fraud of the custom, and that it might be disputed by the daughter's husband. Gift of personalty by freeman may be in life-time, or in *extremis*, if he divests himself of the property, and it is enjoyed accordingly; and if clearly not a testamentary act, in fraud of the custom. *Tomkyns v. Ladbroke.* Page 444



D.

DEBTOR AND CREDITOR.

1. A testator reciting the amount of a debt he owed *A.* according to his own computation of it, directs such amount to be paid out of his real and personal estate; and bequeaths an annuity to *A.* for life, out of his real and personal estate.

Such creditor may enjoy the annuity, and be at liberty to dispute the testator's calculation of the debt. *Clark v. Guise.* 447

2. A debtor bequeaths a much

larger legacy than the debt, upon a condition which, by a subsequent deed, it becomes impossible to perform. Held, it would not have been a satisfaction merely by the will, being for another purpose; but that the deed having freed it from the condition, there was a satisfaction. *Mathews v. Mathews.* Page 455

3. Though it is a general rule that a legacy larger than a debt, or equal to it, is to be considered as a constructive satisfaction, minute circumstances will take a case out of such rule. *ibid.*

DEBTS.

What is requisite to make a valid assignment of debts.

Ryall v. Rowles. 176

DECREE.

1. Decree on equity reserved, after verdict on issues at law, finding a will and other instruments to have been forged. *Barnesly v. Powel.* 77 & 152
2. Enrollment of Decree vacated, having been done too expeditiously. *Wright v. Wright.* 166
3. As to the process on a decree for possession of land. 205

DEEDS.

1. Grant of personal estate, *by deed, to trustees*, for a niece after the death of the grantor, passes to her representatives, although the niece died in the grantor's life-time. *Peck v. Parrot.* Page 134
2. As to neglect of a mortgagee in obtaining the title deeds. *Ryall v. Rowles.* 176
3. Though an offer be made to confirm a widow's jointure, she is not obliged to discover the title deeds until the offer be effectuated. She must, however, state the date of her jointure deed, whether it was executed at that time, and the premises. *Leech v. Trollop.* 458

DEEDS (VOLUNTARY).

4. A deed executed on the same day as a will, held to be a testamentary act ; and void against creditors. *Peacock v. Monk.* 82
5. Voluntary provision in trust for natural children, good against the father's representative. The estate, having been sold by him for a valuable consideration, the Plaintiffs were decreed to have satisfaction out of his assets, as there were words in the deed amounting to a covenant. An account being directed, a de-

duction was made in respect of their maintenance. *Williamson v. Codrington.* Page 226

6. Voluntary deeds good against representatives, *if they amount to a complete conveyance or transfer.* *Attorney General v. Whorwood.* 247

DEFENDANT.

A party may resist a demand, or rebut an Equity, as a Defendant, by parol evidence, which would not have been admitted to be read in his favour, had he been a Plaintiff. 3 and 4

DELIVERY.

In the case of *donationes mortis causa*, an actual delivery is indispensable to vest the property, if the subject matter is capable of delivery. *If it be not so*, there must be a delivery of what is equivalent to it at law. In the case of *stock, &c. delivery of the receipts, &c.* not sufficient to constitute such a gift, though strong evidence of the intent. *Ward v. Turner.* 398

DEMURRER.

See also PLEADING and PRACTICE.

1. General demurrer over-ruled, being unsupported by answer or

or plea to a specific charge in the bill. *Stroud v. Deacon.*

Page 32

2. Demurrer allowed to a bill for payment of wages of knights of a shire; the remedy being at law. *Shepherd v. Cotton.* 33
3. Demurrer on the ground of forfeiture, and others, as to account of corn ground at other mills than the Plaintiff's, and to a decree that all Defendant's corn should be ground at his mill. *Lord Uxbridge v. Staveland [Statham].* 44
4. In order to bind "*assigns*," or "*heirs*," under a covenant, *the bill must state them to be so bound*, or it will be demurrable. 44
5. A demurrer, if good to the relief, will extend to the discovery also; though a Defendant may waive such advantage if he please. 114
A demurrer is either allowed, or over-ruled *in toto*. 115
6. Demurrer to information as subjecting Defendant to pains and penalties. A demurrer may be put in after a plea is over-ruled. *East India Company v. Campbell.* 136
7. Demurrer allowed to a discovery of the fact of a marriage, which, if taken place without consent, would cause a forfeiture of an estate; *the*

bill charging there was such marriage, and *no consent*.

Chancy v. Fenhoulet. Page 358

8. *Quære*, whether a demurrer will not lie to a supplemental bill, in nature of a bill of review, upon the discovery of new matter, on account of Plaintiff not having obtained leave of the Court, and made the usual deposit. *Cole v. Gibson.*

222

Et vide Mr. Beames' Orders in Chancery, 1, and the notes, and 368, *ibid*.

DEPOSITIONS.

1. Where it is quite clear that an examination in chief is morally impossible, there may be a publication of depositions taken *de bene esse*. *Gason v. Wordsworth.* 373, 377
2. Depositions *de bene esse*, published saving just exceptions, the witnesses being dead before an opportunity to have examined them in chief, though there was delay on both sides. *Anonymous.* 416

DESCRIPTIO PERSONÆ.

Question as to whether a bastard could take under the denomination in a will of "*eldest son*," by way *descriptio personæ*,

persona, the testatrix knowing of his existence, and believing that there was no lawful issue.

Baker v. Baker. Page 337

DEVISE.

1. Devise of all the remainder of testator's goods and "*real estates*," will pass the *inheritance*, and all his interest in lands, including reversions. *Ridout v. Paine.* 13
2. Devise to *A.* in fee, with directions to settle on descendants of his mother for their several lives, &c. *A. may limit an INHERITANCE to effectuate the general intent.* *Godolphin v. Godolphin.* 21
3. Devise to *A.* for life with power to trustees to settle a jointure on his wife; and subject thereto, in strict settlement, on the issue of such marriage; *but if A. should die without any issue of his body*, then over. The latter words gave an *estate tail* by implication. *Allanson v. Clitherow.* 23
4. The Court will not appoint a receiver on bill by an heir at law against a devisee, unless there are strong circumstances. *Knight v. Duplessis.* 165
5. Lands agreed to be purchased pass by general words in a will, such as "*or elsewhere.*" *Potter v. Potter.* 202
6. Devise, Execution and Attes-

tation of.—Not necessary under the Statute of Frauds that a testator *should sign* in the presence of the witnesses. His acknowledgment of his handwriting is sufficient, although done to the several witnesses at different times. Where a will is to be established in Equity, it must be proved by each of the subscribing witnesses *if living*, and *if dead*, *their deaths* must be substantiated, &c. One of the witnesses being beyond sea, there should have been a commission to examine him; and the Court could only direct a Trial at Law. Attestation of *marksmen* good under the Statute of Frauds.

Grayson v. Atkinson. Page 404

DEVISE (EXECUTORY).

7. An estate being devised to *R.* "*or his heirs*," on a contingency, and *R.* having conveyed all his right, title, &c. before the contingency happened, and then died, his heir has no claim. *Wright v. Wright.* 192

DISTRIBUTIONS (STATUTE OF).

1. Posthumous brother of the half blood, entitled under the statute. *Burnet v. Mann.* 88
2. Under

2. Under a bequest of residue to trustees, to pay the interest to the widow for life, and after her death to divide the residue amongst such of testator's *relations as would have been entitled under the statute, if he had died intestate*, held that the widow's representatives were excluded. *Davies v Baily*.
Page 63
3. Bequest "to such of nearest *relations*" as A. should think poor and "objects of charity," confined to those within the Statute of Distributions, under A.'s advice. *Goodwyn v. Goodwyn*.
221 [mispaged] 222
4. English subject resident and dying in England, where his will was proved, but having debts and choses in action in Scotland, held, that the latter were distributable as the rest of his effects. Debts follow the person of the creditor, not of the debtor. As to debts due to a freeman of London. *Thorne v. Watkins*.
280
5. Where no issue, nor brother or sister of an intestate, an aunt takes under the statute equally with nephews and nieces. In such case they take *per capita*, and not *per stirpes*. *Lloyd v. Tench*.
345
6. Bequest to "*near relations*," means those within the sta-

tute of Distributions. *Whithorn v. Harris*. Page 423

DOWER (FREEBENCH, &c.)

1. What shall be a bar of, &c.
43, 44
Wife barred of *free-bench*, by settlement under agreement before marriage, to accept it in lieu of dower, or *thirds*. *Walker v. Walker*.
43
2. Devise of residue of personal estate to a wife, no bar of dower by implication. *Ayers v. Willis*.
127
3. The Court, in taking general accounts, making an allowance to a widow for arrears of dower, will not put her to a fresh suit for future profits, but will decree them to be paid. *Graham v. Graham*.
141

E.

ECCLESIASTICAL COURT.

As to commissions of review from the delegates of, See 26

EJECTMENT.

After leave given by the Court
to

to bring an ejectment, a new ejectment cannot be brought without leave. *Sands v. Sands*.
Page 216

ELECTION.

1. Heir put to his election as to an unsurrendered copyhold. *Allen v. Poulton*. 78
2. *Aliter* as to real estates at the common law, where will is incompetent to pass them, as from defect of its execution, &c. &c. 79, 80
3. A person taking a benefit in real or personal estate, under a will, must abide by it *in toto*. Therefore an unsurrendered copyhold was decreed to pass. *Cookes v. Hellyer*. 133
See Kirkham v. Smith. 141
4. Marriage settlement rectified by a strict settlement agreeably to the ordinary course, notwithstanding it agreed with the articles verbatim, and both made before marriage. The Plaintiff, however, having taken a benefit under the will, which he disputed, held to have made his election, and decreed to give up part of the settled estate in satisfaction. *Roberts v. Kingsley*. 135
5. Deed poll not delivered, but operating at the death of grantor, and a bond given in favour of a natural daughter. She was put to her election. *Johnson v. Smith*. Page 162
6. Will purporting to give a real estate to A. but not executed agreeably to the statute, giving (*inter alia*) a contingent legacy to an infant (who became the testator's heir at law), and expressly directing that if any who received benefit from the will, should dispute it, they should forfeit all claim under it. The infant heir decreed to elect when he came of age; and the intended devisee allowed to be in possession in the meanwhile, subject to account, &c. *Query*, as to the latter. *Boughton v. Boughton*. 259
7. *See Jenkins v. Jenkins*. 264
8. Legacy in lieu of things expressed, shall not put the party to his election as to another benefit; though it may be contrary to an intent that he should take both. *East v. Cook*. 277
9. Election to be made by a Feme Covert resident abroad cannot be effectuated under a power of attorney, &c. from the husband and wife, or any thing short of a commission, or as near thereto as possible. *Parsons v. Dunne*. 291

ENROLMENT.

Enrolment of decree vacated, having

having been done too expeditiously. *Wright v. Wright.*

Page 166

ENTAIL.

See ESTATE TAIL.

EQUITY.

See also JURISDICTION.

1. A demand may be resisted, or an Equity rebutted, by parol evidence, which could not be the foundation of a substantive claim by a Plaintiff.
3 and 4
2. As to the Court's interference by way of specific performance of covenants to rebuild. *City of London v. Nash.*
14, 15
3. Money to be laid out in land, considered in Equity as land. *Sperling v. Toll.* 52
4. The Courts will not relieve against a master's legal right to the earnings of his apprentice. *Hill v. Allen.* 63
5. An attorney not disclosing an incumbrance to the buyer of an estate, and leaving him to suppose the title would be a good one, held liable to make satisfaction in default of the vendor. *Arnott v. Biscoe.* 69
6. After a verdict on issues at law, establishing the fact of a will and other instruments having been forged, the party was (*inter alia*) restrained from

making use of, or insisting on a Decree made by the Court of Exchequer; and ordered to consent to a reversal of a sentence in the Spiritual Court. *Barnesly v. Powel.*

Page 77 and 152

7. Equity will relieve against bargains made under a misconception of rights; and more especially where the other party seems better apprized. In such a case the Court decreed the repayment of a specific sum of money, with interest and costs. *Bingham v. Bingham.* 81
8. Money to be laid out in land, considered as land, to effectuate a testator's general purpose. *Johnson v. Arnold.* 99
9. Bill lies for payment of an entire rent out of a manor, against the owner of such manor, without resorting to the several occupiers, where there are no demesne lands on which to distrain. *Duke of Leeds v. Powell.* 100
10. No relief in Equity where an action of law would not lie by reason of a substantial defect; such as a contingency not happening. *Whitmel v. Farrel.* 140
11. No relief in Equity on a lost [legal] instrument, without an affidavit of the loss, and offer of indemnity. As to an action on a note payable to A. or bearer.

- bearer. And as to the *modern practice of actions at law*, and the ancient and established Jurisdiction of Courts of Equity on lost bonds. *Walmsley v. Child.* Page 171
 See also *Whitfield v. Pawcet.* 180, 181, also 998, 999
12. Relief against agreement made under a misconception of rights. Agreement as to distribution of personal estate set aside, although ratified; the value appearing much greater than was known to the Plaintiff at the time. *Cocking v. Pratt.* 187
13. Relief on bond misdrawn by mistake; and a just demand out of assets will be satisfied in Equity, though there be no remedy at Law from the nature of the instrument, &c. *Bishop v. Church.* 303, and 383
14. No jurisdiction in the Court to deal with any property given over in default of issue, upon any probability whatever of there being no issue.
 Bills in Parliament on such grounds often refused. *Anonymous.* 308
15. Factor or correspondent pretending to insure as directed, charged as if he had insured. But such equity does not extend to an agent employed by him [ignorant of such deception]. *Tickel v. Short.* 350
16. Quere, whether a trustee or his heir can claim admittance to copyholds, or hold for their own benefit, where the cestuy qui trust has died without heirs.
 It is a question whether trust estates in copyholds *escheat* to the Lord in such a case? *If they do*, and the trustee has been admitted, it seems he would be considered as holding for the benefit of *the Lord*; and decreed to surrender.
If they do not escheat, the question is, *who* is entitled to the beneficial interest.
 Page 368, 369
 It has been *said*, a Court of Equity would decree such an estate to be sold for the benefit of *the next of kin*; but *that seems very doubtful.* 369
 Quere, therefore, whether, in such a case, the Lord could refuse the trustee admittance, and if compellable *by law* to admit him, he would not be entitled to the assistance of a Court of Equity? *ibid.*
17. Thirty shares in a privateer remaining unsubscribed for, and taken by the managers of the concern on their own account, after a valuable capture, held to be the exclusive property of the managers. Bill on behalf of the other subscribers dismissed; since, if there

there had been a loss, they could only have been answerable to the amount of their own shares.

Not dismissed with costs, as this act of the managers might give occasion to litigate the matter.

In all mercantile contracts and adventures, parol evidence of usage in such cases allowed.

Parol evidence, in the above case, as to usage and custom on the written articles, taken on behalf of the Plaintiffs, but not being read by them at the hearing, allowed to be called for and used by the Defendants. *Blunt v. Cumyns*.

Page 375

18. Fine by persons in possession and non claim, the legal estate being in trustees, held not to bar an equitable charge under the deed of trust; though a great length of time had elapsed. *E. Pomfret v. Lord Windsor*. 411

19. Assignees of a bankrupt are not compellable to pay what is really due on a transaction attended with usury under the general jurisdiction in bankruptcy. It is otherwise where they apply to a Court of Equity by a bill to be relieved. *Ex parte Skip*. 414

20. Bill *quia timet*, A. having disposed of part of a specific

sum, which he had covenanted should be paid to B. on a contingency, decreed to secure it. *Flight v. Cook*. Page 448

ESCHEAT.

It is not absolutely determined, whether trust estates or equities of redemption in copyholds *escheat* to the lord.

368-9

Query, therefore, whether a trustee or his heir can claim admittance to copyholds, or hold for their own benefit where the *cestuy qui* trust has died without heirs?

It is a question whether trust estates in copyholds *escheat* to the Lord in such a case? *If they do*, and the trustee has been admitted, it seems he would be considered as holding for the benefit of the Lord, and decreed to surrender. *If they do not escheat*, the question is, who is entitled to the beneficial interest? 368, 369

It has been said a Court of Equity would decree such an estate to be sold for the benefit of the *next of kin*, but that seems very doubtful. 369

Query, therefore, whether, in such a case the Lord could refuse the trustee admittance, and if compellable *by Law* to admit

admit him, he would not be entitled to the assistance of a Court of Equity.

Page 368, 369

ESTATE.

1. Devise of all the remainder of testator's goods and "*real estates*" will pass *the inheritance and all his interest in lands including reversions*. *Ridout v. Paine*. 13

2. A devise of a testator's "*estate at A.*" without more, will comprehend *his whole interest in the lands rather than* be referable to the mere locality.

If, however, words of limitation be added, they will determine the extent of the benefit. *Southby v. Stonehouse*.

447

ESTATE FOR LIFE.

Question as to whether an estate for life or in tail. *Bagshaw v. Spencer*. 85

ESTATES *pur auter vie*.

1. As to whether these should be considered as *real* or as *personal* estate. See in *Allanson v. Clitherow*. 23
2. Lease for three lives to A. *her executors, &c.* A. assigns

all right to the use of B. for life, and afterwards of his issue; and for want of such issue, to the use of A. *her executors, &c.* The whole vests in the issue of B. and issue means children; and A.'s executor, who was a special occupant, cannot claim against it. *Williams v. Jekyll*. Page 462

ESTATE TAIL.

1. Devise to A. for life, with power to trustees to settle a jointure on his wife: and subject thereto, in strict settlement on the issue of such marriage; but if *A. should die without any issue of his body, then over*. The latter words gave an *estate tail* by implication. See *Allanson v. Clitherow*. 23
2. Money not allowed to be entailed. *Butterfield v. Butterfield*. 83
3. Furniture and household goods bequeathed for the use of those who should enjoy an estate, to be taken care of and delivered by executors, and to remain as if in testator's own possession, held to vest in the first taker. *Wyth v. Blackman*. 113
4. Personal estate incapable of entail. 340
5. Devise of real and personal estate in trust for A. for life; and

and afterwards for B. for life, and afterwards for the heirs of his body; afterwards for the other sons of A. successively in tail, taking testator's name; then to the daughters in tail; for want of such issue to convey to C. in fee. B. is entitled to a conveyance in tail of the real and of the absolute property of the personal. The intent being at least doubtful, the legal operation of the words cannot be taken away; and as to the personal, it vested absolutely by such limitation, whether so intended or not. *Garth v. Baldwin.* Page 456, 457

6. Devise to H. for life, and no longer, taking the name of R.; and to such son as he should have, taking the name; and in default of such issue, remainder over.—Held an estate to H. in tail male. *Robinson v. Robinson.* 347

7. Question as to whether an estate for life, or in tail. *Bagshaw v. Spencer.* 85

8. Trust of a *chattel real* for S. for life, and immediately after her death, for the "*heirs of her body*," with limitations over. The whole interest vested in S. As to where the words "*heirs of her body*" have been held words of purchase in the same sense as "*issue*." *Theobridge v. Kilburn.* 350

9. Questions as to equitable es-

tates in tail. *Brownword v. Edwards.* Page 353

10. Sir Thomas Sewell decided that under a limitation by marriage articles for *the first son, and the first son of such first son, the former could not* be restricted to a life estate, or *take less than an estate tail*; but the law seems contra now. *Hucks v. Hucks.* 438

11. Feme Covert by will pursuant to power, leaves to her husband "all the profits and revenues of my estate of A. and B. for life, and after his death, my said estates to my children, if I should leave any to survive me; but if I should leave no such child or children, nor the issue of such, the said estates to I. H.; making him sole heir in default of issue, and after the death of my husband." *The children take an estate tail; not fee simple*; and the remainder to I. H. is good; not a contingent executory limitation on her dying without children living at her death, but a general dying without issue. *Southby v. Stonehouse.* 446, 447

EVIDENCE.

1. No decree in Equity on the tes-

- testimony only of *one* witness against a *positive* denial by answer, uninfluenced by other circumstances. Page 50
2. Accounts, memoranda, &c. of a deceased party, read in evidence in exoneration of his assets, as against another defendant, who was charged as equally liable to the Plaintiff's demand. *Hill v. Ballard*. 56, 57
 3. One witness held sufficient to prove a testator's intention in favour of his brother, to *rebut* a *constructive* trust. *Maddison v. Andrew*. 45
 4. The objection as to the examination of Counsel, Attornies, Solicitors, &c. as witnesses, is not on the ground of any *personal* privilege in them, but for the sake of *the client*, or *party concerned*. Courts, therefore, both of Law and Equity, will stop such disclosure, or suppress such depositions, if made to the party's prejudice. 47
 5. Answer of an heir at law, *believing that a will was made*, will not prevent the necessity of proving it. *Potter v. Potter*. 147
 6. *Draft* of a deed, traced into possession of a Defendant's family, very good evidence. *Whitfield v. Fawcett*. 180
 7. *Disusage*, evidence of *abandonment by consent* as to part of a constitution relative to a charity, *which arose from consent*. *Attorney General v. Scott*. Page 194
 8. A husband receiving the proceeds of a sale of wife's estate, and promising by a note or receipt to lay it out pursuant to trusts relative to other property, this note held evidence of the agreement antecedent to the sale; and estates purchased afterwards by the husband, were held to be bound. *Attorney General v. Whormood*. 247
 9. A deed may be evidence of an act of bankruptcy, though made in favour of creditors. *Clavey v. Hunt*. 269
 10. Bill by executors on loss of notes mentioned in a list written by the testator. Such a list not of itself evidence of the property, but left to be tried at law. As to the difference of proceeding in equity or at law on lost instruments, want of proof of bonds, &c.
No Decree for a plaintiff in equity on the evidence only of one witness, in contradiction to Defendant's positive answer. The testimony of a witness read if he was indifferent when examined, though becoming interested afterwards. *Glynn v. Bank of England*. 28
 11. A person's own entry in books

books of account, allowed on enquiries before the Master, as evidence of a claim made in his life-time; but not as original or positive evidence of the fact.

Entry by servant, or agent, usually employed in such matters, allowed as good evidence, upon proof of his death. *Le-febure v. Worden.* Page 285

12. On loss of a deed, &c. the same rule of evidence here, as at Law. Loss of deed can only be made out by circumstances. The destruction of a deed, &c. by affidavit. Decree in a former cause between the same parties, read as evidence, though not conclusive. So also of depositions in a cause which had settled the rights of all; as under a decree for performance, of trusts. *Askew v. The Poulterers' Company.* 299

13. The same rule of evidence at Law and in Equity as to the loss of a deed. On liberty given to bring an action, unnecessary to order that the depositions shall be read at Law. *Clavering v. Clavering.* 348

14. Depositions of one Defendant not read in favour of another, where the former is at all concerned in interest, or a Decree can be made against him. Such objection is wholly as to his incompetency. Though a

Plaintiff at Law is not allowed to examine any Defendant as a witness, one Defendant may there examine a Co-defendant. In Equity, a Plaintiff may examine a Defendant; and a Defendant a Co-defendant, but then it is on a suggestion that the party is not interested, and saving all just exceptions from the nature of the suit, &c. or in case of there being any material evidence against him, &c. &c. *Dixon v. Parker.*

Page 346

15. In proving exhibits *viva voce*, the rule is invariable that the party can only examine the witness to the *handwritings*. Nothing therefore can be used as an exhibit, proved *viva voce*, in respect of which the other party would have had a right to cross-examine. It seems, however, that the benefit of such instruments, on the one side, and the right to controvert on the other, is a proper subject of adjustment either in the Master's Office, under a commission by virtue of his certificate; or under a trial at law. *E. Pomfret v. Lord Windsor.* 411

16. Parties resting their defence in an issue at law upon instruments ascertained at the trial to be forged, will not be allowed to enter into any other evidence; or to say the forged instru-

instruments were immaterial.
Kemp v. Mackrell. Page 441

EVIDENCE (PAROL.)

See AGREEMENT, RESIDUE,
 NEXT OF KIN, &c.

17. Parol Evidence admitted in favour of a Defendant to resist a demand, or rebut an equity where it could not be the foundation of a demand in a Plaintiff. 3, 4
18. *See Robinson v. Gee.* 139
19. As to admission of Parol Evidence where fraud or surprise. *Baker v. Paine.* 210
20. *Vide in Bishop of Cloyne v. Young.* 300
21. Parol Evidence admitted to explain a will where doubtful: not to contradict. *Hampshire v. Pearce.* 346
22. Bill for specific performance of a written agreement, and parol evidence read of a variation from it; which being proved, the bill dismissed with costs; the Plaintiff not being allowed to resort to the substantial agreement thus proved on the part of the Defendant. Parol evidence admitted to resist a claim, or rebut an equity, though inadmissible to establish a demand. *Legal v. Miller.* 367
23. Parol Evidence as to the

custom and usage of merchants admitted in all mercantile contracts and adventures.—Parol Evidence, which had been taken on behalf of the Plaintiffs, but not used by them, allowed to be called for, and read on behalf of the Defendants.

Blunt v. Cumyns. Page 375

24. Parol Evidence admitted to shew, that though a bond, on marriage, was for 150*l.* per annum, yet the agreement was for 100*l.* The bill dismissed, as founded on a private agreement, calculated to deceive a material party. It was dismissed, however, without costs. *Piteairne v. Ogbourne.* 384

EXCEPTIONS.

See also PLEADING, ANSWER, &c.

1. Confirmation of Master's Report opened, and the Report allowed to be excepted to, or reviewed under particular circumstances, although previous exceptions had been disallowed after argument. *Hawkins v. Day.* 109
2. Exceptions to a certificate from Commissioners of Bankrupt. *Vide* "Bankrupt," and *Ex parte Bar.* 386
3. Lord Hardwicke held that in the case of a bill for discovery of a Defendant's title, he might object

- object to make such discovery by his answer as well as by plea, &c. *Buden v. Dore.* Page 400
4. A Defendant who did not except to the first report of insufficiency of an answer, held not absolutely excluded from insisting on the same matter in his second answer. Though a Defendant is not bound to answer what may subject him to ecclesiastical penalties; or whether he is or not married to a woman he cohabits with; or whether he is an alien, &c.; he must, in a proper case, answer whether he hath, or not, a *legitimate son.* *Finch v. Finch.* 415
5. There is a difference in consideration of law and the strict rules of the Court as to the case of a *lunatic* being let in to take exceptions to a Master's Report after its being confirmed, and that of an infant, but it is equally open to the discretion of the Court in either case. *E. of Bath v. E. of Bradford.* 443
- demands under a clear contract. *Johnson v. Mills.* Page 151
3. Residue undisposed of, held vested in *Executors beneficially*, and no resulting trust for the next of kin, *although the executors had legacies given them.* In this case the executors were infants, and the legacies specific, distinct, and unequal. *Blinkhorne v. Feast.* 276
4. Though the Court is not strict in holding executors, who have acted fairly, to an admission of assets; yet in this case, circumstances tending to shew that the Defendant had admitted assets several years before and he having obtained a release, which the Court held to be fraudulent, a personal Decree was made against him for the legacy and interest, with costs. *Horsely v. Chaloner.* 295
5. Testator manifesting an intention to dispose of the residue, but leaving it inchoate, inasmuch as he did not name the residuary legatee, it was held that the executors were not entitled to the surplus.

Where parol evidence can be read to show no resulting trust, like evidence may be read contra to disprove the implication from the former.

Legacy to one alone of two (or more) executors, will not exclude either.

6. Legacy

EXECUTORS.

1. Discretionary power given to Executors is not determined by the death of one of them. *Flanders v. Clarke.* 12
2. An Executor is bound to set apart a fund to answer future

6. Legacy to *the daughter, &c.* of an executor, is not to be deemed a legacy to him so as to prevent his taking the surplus merely for that reason. *Bishop of Cloyne v. Young.*

Page 300

7. Legacy to next of kin, as well as to executors, though to ever so small an amount, does not exclude the next of kin from the residue. Legacy *does exclude* executors in general; though not universally. *Andrew v. Clark.*

332

8. Testator having appointed his wife and the Defendant executors, and given his wife certain specific articles, and his wife having died in his lifetime, the Defendant held entitled to the whole residue, comprising those articles as lapsed; and the bill of the next of kin was dismissed; but without costs. *Wilson v. Ivat.*

335

9. Devise of a real estate in fee to *the wife* of surviving executor, no objection to his taking the residue of the personalty.

Sir J. Strange, M. R. held that executor, *as such*, takes all that is not disposed of, whether by lapse or otherwise, unless a contrary intent is clearly shewn; calling him a "*legal residuary legatee*."

336

10. Distinction between the executor, *as such*, taking *lapsed residue* and a *lapsed legacy*.

Held that he does not take the former. As to the latter, *quere.*

Page 336

11. Executor not having exhibited an inventory, and having paid all legacies but one, is a sufficient foundation to charge him with assets as to that legacy, though not positively conclusive.

An inventory solemnly exhibited not conclusive on executor, if there has been a variation of circumstances. A legatee paid by an executor voluntarily, not obliged to refund to the rest; except in the case of his insolvency. *Orr v. Kaimes.*

343

12. Each executor has entire controul over a testator's personal estate; he may release, pay, or transfer without the others. And so as to each administrator; though formerly questioned.

One executor may retain in satisfaction of his own debt, if no fraud.

A surviving partner, therefore, being an executor of the deceased partner, and having mortgaged leasehold property of the latter for better security of a debt due from the testator to himself, the mortgagees were entitled to satisfaction; and creditors of the testator, under marriage articles, who had no specific lien, were not allowed

- allowed to pursue the premises thus assigned. *Jacomb v. Harwood*, Page 358
13. Executors can make a valid assignment of their testator's property in respect of their own debts, or where they apply the consideration of it for their own purposes, if no fraud in the other party, or reasonable ground of suspicion in the transaction. *Taner v. Ivie*.

407

14. Executors and administrators are considered as trustees in many instances. 412
15. Bequest of residue to go over in a particular event (which took place) to (leaving a blank.)

The executors excluded by such inchoate gift, and the next of kin entitled.

Next of kin not excluded from taking the residue by legacies bequeathed to them. *Lord North and Guildford v. Purdon*. 416

16. Though every trustee of part of the personal estate is not to be called to account by a particular pecuniary legatee, but only by the executor or administrator; and though such trustee, who receives the trust money, and thereby becomes a debtor, is not to be considered and chargeable as executor, merely because he is so named

in a will, yet where he is made a co-executor, and does not renounce whilst he receives the trust money, he is properly made a Defendant to a suit for a general account, and is accountable therein for his receipts; and *this* the more especially since his being named executor is a release of the debt at law. *Moore v. Moore*. Page 445, 446

EXECUTORY DEVISE.

Contingent remainder on an executory devise. *Hopkins v. Hopkins*. 145

EXPECTANCIES.

See POST OBIT BONDS.

Purchase of a reversion not set aside merely for undervalue, there being no fraud. *Nichols v. Gould*. 394

EXONERATION.

1. Incumbrances of an ancestor not a primary charge on the son's personal estate, although the latter had entered into a covenant to pay them. *Leman v. Newnham*. 40
2. Settlement on marriage, of estates,

2 N

tates,

- tates, leasehold and others, which were subject to incumbrances. The issue of the marriage held not intitled to have them disincumbered out of their father's assets. *Clarke v. Samson.* Page 71
3. Second tenant in tail joins in a mortgage and bond with the first, who receives the money lent. Held to be only a surety, and the real estate not liable in aid of the personal estate of the first, although he had joined in hopes to prevent a recovery. Parol evidence of an agreement between the parties deemed inadmissible. *Robinson v. Gee.* 139
4. Tenant in tail pays off an incumbrance, but takes no assignment; the remainder over, *under the circumstances*, subject to pay it to his representative. *Kirkham v. Smith.* 141
5. Exoneration of personal estate by the real estate must be *by express declaration or necessary inference.* 213
6. A father, tenant for life, procured his son, who was tenant in tail, to join in raising money, which the father received and applied to his own use. Decreed to exonerate the estate; the son being only in the nature of a surety for it as the debt of his father. *Piers v. Piers.* 231
7. Money due by testatrix at her

death, in respect of suits instituted by her *relative to her real estates*, held to be a charge upon her real estate; and that the personal estate was wholly exempt. *Mogg v. Hodges.*

Page 284

On forfeiture of an estate, the Crown or its grantee takes it *cum onere*; that is, subject to all charges fairly binding the party with reference to it, although voluntary; but not subject to debts at large. The Crown in such case has the same equity to be relieved against conveyances on the ground of fraud, &c. &c. as the party would have. *Duke of Bedford v. Coke.* 310

F.

FACTOR.

Plaintiff a factor abroad, having exceeded the price limited for a purchase of hemp; the defendant, who objected to the contract, but afterwards reshipped and disposed of some of it on a new risque, was ordered to account for the whole at the cost price. *Cornwall v. Wilson.* 225

FEE

FEE.

See also ESTATE OF INHERITANCE, &c.

It is not necessary that the word "*heirs*" should be inserted to carry the fee, where the purposes of a trust cannot be answered unless the trustees have a fee. *Gibson v. Lord Montfort.* Page 214

FEE (CONDITIONAL.)

Annuity in fee granted by king Charles II. out of Barbadoes duties, is not a rent nor realty; nor within the Statutes either of Frauds or De Donis, &c. Therefore being settled on *A.* "and the heirs of her body," it was held to amount to a *fee simple conditional at the common law*, the remainder over being void, and that *A.* having had issue, might bar the possibility of *reverter*. *Earl of Stafford v. Buckley.* 340

FEE (SIMPLE.)

Devise of all that "*estate*" testator bought of *M.* held to pass the fee. So held also as to another clause, which was a devise of "*the reversion*" of that tenement his sister lived in after her death. Held com-

tra as to other devises, being *first*, "all those houses he bought of *T. W.* containing three dwellings, with all their appurtenances," and next as to a devise of *that tenement* in the possession of *M. B.* presently after his death." *Bailis v. Gale.* Page 283

FEOFFMENT.

A deed poll by a father, in favour of his family, purporting to grant real and personal estate, to take effect after his decease, *and without any livery made*, held to amount to a covenant to stand seised. *Rigden v. Vallier.* 355

FINE.

1. As to a fine of land *not barring* a rent charge issuing out of the land, and belonging to a third person. 181
2. Fine by persons in possession, and non-claim, the legal estate being in trustees, held not to bar an equitable charge under the deed of trust; though a great length of time had elapsed. *Earl of Pomfret v. Lord Windsor.* 411

FORFEITURE.

1. Gift over on *A.*'s refusal to marry
2 N 2

- marry *B.* The forfeiture held not to take place from an offer being declined once or twice, but from a more formal acknowledgement. *Johnson v. Smith.* Page 163
2. On forfeiture of an estate, the Crown or its grantee takes it *cum onere*; that is, subject to all charges fairly binding the party with reference to it, although voluntary; but not subject to debts at large. The Crown in such a case has the same equity to be relieved against conveyances on the ground of fraud, &c. &c. as the party would have. *Duke of Bedford v. Coke.* 310
3. The legal disability of an alien to hold lands, neither a penalty or forfeiture. *Attorney General v. Duplessis.* 368
4. Demurrer allowed to a discovery of the fact of a marriage, which, if taken place without consent, would cause a forfeiture of an estate; *the bill charging* there was such marriage and *no consent.* *Chancey v. Fenhoulet.* 358
2. A will relative (*inter alia*) to real estate having been found by a verdict at law to have been forged, the Defendant ordered to transmit and lodge the probate, &c. with the Registrar of the Ecclesiastical Court, &c. &c. *Barnesly v. Powell.* Page 152, 158

FRAUD.

1. As to securities, &c. in fraud of marriage agreements. 58, 66
Settled estate disencumbered of a charge in fraud of a marriage agreement. *Troughton v. Troughton.* 66
2. A party having obtained a sum of money from the plaintiff in purchase of an estate to which the Defendant had laid claim, but of which he seemed to be apprized the Plaintiff was the true owner, decreed to refund that specific sum, with interest and costs. *Bingham v. Bingham.* 81
3. As to suspicious assignments for the family of an insolvent debtor. *Jenner v. Wilkins.* 112
4. A promissory note *suspicious in itself under the circumstances*, and the *admitted object* of it being an *improper one*, even if the note were actually genuine, decreed, *at the instance of*
1. Issues directed as to the forgery of a will and other instruments, and decree on the result on the equity reserved. *Barnesly v. Powell.* 77, and (152)

FORGERY.

of the person alleged to have given it, to be deposited with the Registrar of the Court in the first instance; with a declaration that the Plaintiff was entitled to be relieved against it; without preventing the Defendant from bringing an action on it within a reasonable time; and if delay in so doing, then to be delivered up. *Bishop of Winchester v. Fournier.*

Page 401

5. Assignment of a sailor's share of prize money at an under-value, set aside for fraud; but still to stand as a security for what was really advanced. The same equity as to an under assignment. *How v. Weldon.*

418

6. Gift of an annuity soon after coming of age to trustee, or guardian, set aside on general principles of public utility; and here, furthermore, on particular circumstances of imposition. A person, however, may bind himself, soon after coming of age, under proper circumstances, as if, being actually in possession, and quite *sui juris*, he makes such a grant by way of reward. *Hylton v. Hylton.*

427

7. Relief against deeds obtained by fraud and imposition.

Conveyance for consideration not afterwards to be set up as a gift; and being for

fictitious consideration, inserted by the grantee himself, though found a gift by a jury, set aside in equity.

Interest obtained through fraud cannot be maintained by third persons, though not themselves parties to the imposition. *Bridgman v. Green.*

Page 452

FRAUDS (STATUTE OF.)

See EVIDENCE PAROL.

1. A mother suffering a marriage to take place upon an understanding that she would give her daughter 1000*l.* portion; and articles having been executed amongst the other parties, whereby such portion was agreed to be settled. Held, that her signature to the articles, as a witness, she knowing the contents, was equivalent to her being an actual party to them, so that she could not take advantage of the statute. *Welford v. Bezely.* 6
2. With reference to the statute, the word "party" is not to be considered as party to a deed, but as person in general. 6
3. The statute of Frauds does not enable a party to commit a fraud; as in the case, where a mere mortgage being contemplated, and an absolute con-

conveyance made by one deed with the *intention of a defeasance being executed* by another, *which never takes place*, &c. &c.

Dixon v. Parker. Page 346

4. Bond by husband on marriage, reciting agreement to settle wife's estate on the issue, &c.; the wife not an executing party. After the marriage, a real estate of the wife came into possession. The husband died. The wife married B. and died; bill by a younger child against B. and the heir of his mother. It seems that the Statute of Frauds could not have been taken advantage of, on account of the wife not having been an executing party, since the marriage took place in consequence of the instrument executed by the husband. Here, however, the wife had proved and acted under her first husband's will, which recited the bond; from whence it was held that she had bound herself at all events. *Archer v. Pope.* 422

G.

GRANT EX TURPI CAUSA.

Bill for payment of a sum of money and an annuity secured by

a deed poll by a young woman who had been seduced by a married man, in whose family she lived as companion to his wife, and who, by continuing to live with him, occasioned a separation, *dismissed*; but without costs, on account of her previous good character. *Priest v. Parrot.* Page 330

GUARDIAN AND WARD.

See also WARD OF COURT.

1. As to the marriage of a Ward of Court to a Foreigner out of the Realm :—the protection and interference of the Court, even after a female Ward has attained 21. Its removal of testamentary guardians, &c. see in *Reach v. Garvan.* 88, 89
2. It is waste in a Guardian to convert antient pasture into arable land, even for a temporary benefit. *Clark v. Thorp.* 348
3. Guardian or trustee for an infant, who has a contingent estate, cannot cut timber of his own authority, though it may be fit for cutting, or even for a probable benefit. Though such an act may not amount to waste, he will still be enjoined. *Knight v. Duplessis.* 379

HEIR.

H.

HEIR.

1. Answer of an heir at law, *believing that a will was made, will not dispense with its being proved against him.* *Potter v. Potter.* Page 147
2. The Court will not appoint a receiver on bill by an heir at law against a devisee, unless there are strong circumstances. *Knight v. Duplessis.* 165
3. An estate being devised to *R.* "*or his heir,*" on a contingency, and *R.* having conveyed all his right, title, &c. before the contingency happened, and then died, his heir has no claim. *Wright v. Wright.* 192
4. Devisee on condition that the land should go over to another, if he did not give a release in three months after testator's death, dying in the testator's life-time, the devisee over shall take instead of the heir at law, this being a *conditional limitation*, and not a strict condition. *Avelyn v. Ward.* 195
5. Receiver not appointed on behalf of heir at law, as against a devisee. The heir must try the question at law. *Knight v. Duplessis.* 379

HEIR (EXPECTANT.)

Courts of Equity are more strict now than formerly as to bargains made for a person's expectancies. Page 314, 315
And Evans v. Chesshire. 317

HEIR-LOOMS.

Books not heir-looms; and if limited to go with entailed lands, they become the property of the first tenant in tail. *Bridgwater v. Egerton.* 813

HIGHWAY ACTS.

The Highway Acts protect garden-grounds used for trade as much as private gardens. *Hughes v. Morden College.* 108

I.

IDIOT.

As to *idiots* in the strict sense of the word. 390

IMPERTINENCE.

See also SCANDAL.

1. Reference for scandal may be at

at any time; not so as to mere impertinence. Scandal includes impertinence; but a matter may be impertinent without being scandalous. Nothing scandalous that is strictly relevant to the merits. *Fenhoulet v. Passavant*,

Page 274

2. Any record of the Court may be referred for *scandal* at any time; [and even by strangers to the suit]; but it is otherwise as to a reference for *impertinence*. Though such orders are discretionary to a certain extent, the opportunity may be lost or waived. *Anonymous*. 453, 454

INCUMBRANCES.

See also EXONERATION, MORTGAGE, PRIORITIES.

- Tenant for life must keep down the interest of incumbrances, though the whole of the rents and profits are exhausted by it. The Court will, however, in some instances, direct a reasonable maintenance thereout, if the tenant for life be otherwise unprovided for. *Revel v. Watkinson*. 68

INFANT.

1. Questions as to infant tenants

in tail, their personal representatives, &c. *Rook v. Worth*.

Page 211

2. See ELECTION, and *Boughton v. Boughton*. 259
3. An infant's inheritance is never bound by acts of the Court. *Taylor v. Philips*. 272
4. The next friend of an infant allowed costs, though the bill had been dismissed; *the Master having previously reported the suit for the infant's benefit*. *Taner v. Ivie*. 407
Sed vide ibidem.
5. There is a *difference* in consideration of law, and the strict rules of the Court, as to the case of a *lunatic* being let in to take exceptions to a Master's report, after its being confirmed, *and that of an infant*, but it is equally open to the discretion of the Court in either case. *Earl of Bath v. Earl of Bedford*. 443
6. Where a trustee for an infant has money to lay out for his benefit, and employs it in his own trade, &c. the Court will exercise an option for the infant either to have interest or the profits made. *Anonymous*. 452

INFLUENCE (UNDUE.)

See FRAUD, MISREPRESENTATION, &c.

Stated accounts set aside, the items

items being very gross, and obtained from a person just come of age, under a misrepresentation, and the party [a solicitor] charged with interest on monies directed to be laid out for the infant's benefit, notwithstanding a deed from its grandmother, that he should not be so chargeable. *Brown v. Pring.* Page 192

INHERITANCE.

See ESTATE, FREE, &c.

1. Devise to *A.* in fee, with directions to settle on descendants of his mother for their several lives, &c. *A. may limit an inheritance to effectuate the general intent.* *Godolphin v. Godolphin.* 22
2. Rents and profits undisposed of belong to the owner of the inheritance, or persons entitled to the enjoyment. *Hopkins v. Hopkins.* 145
3. Whatever portion of an inheritance, or part of any term carved out of it, is not expressly or clearly given away or disposed of, remains with the owner of the inheritance or his heir, and therefore a grant or devise of the "*rents and profits*" of such a term, without further words of limitation, will operate only for the pur-

poses expressed, or to be clearly inferred. *Belt v. Michelson.* Page 238

Et vide Conyngham v. Conyngham. 232

4. The purchase of *houses in London, and of lands of the tenure of borough English*, held not to be a due execution of a covenant in marriage articles to purchase or settle "*lands of inheritance.*" *Pinnel v. Hallet.* 364

INJUNCTION.

See also PRACTICE, WASTE, &c.

1. Garden grounds used for trade, as much protected under the Highway Acts, and by injunction in Equity, as private gardens. *Hughes v. Morden College.* 108
2. As to injunctions against creditors suing at law, after a Decree to account. *Martin v. Martin.* 118
3. A jointress having given leave to the next in remainder for life, without impeachment, &c. to cut timber, the remainder man in tail having acquiesced and encouraged his doing so, the latter was restrained by perpetual injunction from bringing action of waste against the jointress. *Aston v. Aston.* 186
4. In-

4. Injunction against stopping lights until trial of the right; which was directed on the motion. The Court will never on motion make an adverse order to *pull down what has been done*. *Ryder v. Bentham*.

253

5. Injunction to stay building not granted in cases of mere injury or inconvenience to property or persons adjoining, or otherwise, except by agreement, or the building being of such a nature as to stop up ancient lights. *Morris v. Lessees of Lord Berkeley*.

404

6. Where a question is one determinable at law, and no obstacle or inconvenience in trying it, a Court of Equity will not interpose by injunction. In this case an injunction to stay the use of a market was refused. A right cannot be established against all persons under a mere bill for an injunction. *Anonymous*.

891

7. Injunction extended to stay trial in actions by a corporation for petty customs. *Anonymous*.

449

8. What will be a breach of an injunction to stay proceedings at law. *Anonymous*.

453

INTEREST.

1. On a debt by covenant in marriage articles, without mention of interest, the Court

would not reduce it lower than five per cent. *Swynfen v. Scawen*.

Page 70

The like interest allowed on a legacy for mourning. *ibid*.

2. The rate of interest on legacies, whether out of personal or real estate, altered since the time of Lord Hardwicke. The Court now allows but four per cent. from the end of one year from testator's death, without distinction; the case of maintenance, however, being an exception. *Bryant v. Speke*. 100
And Coleman v. Seymour.

118

3. Construction of will. Interest of legacy from the death of the testator on the manifest intent as to maintenance. *Beckford v. Tobin*.

161

4. Money charged on an estate in Nevis held only to carry English interest. *Stapleton v. Conway*.

197

5. Husband of tenant in tail takes in a mortgage, and is in receipt of the rents and profits. On a bill to redeem by reversioner after the wife's death, no interest allowed to the husband during his wife's life-time.

Ambury v. Brown. 213

As to tenant in tail keeping down the interest of an incumbrance. *ibid*.

6. Covenant, before the act reducing the rate of interest, to pay six per cent. is not prejudiced

diced by the act; but interest turned into principle by the course of the Court, was directed to carry interest at five per cent. only from the passing of the act. Interest by course of the Court discretionary.

Astley v. Powis. Page 213

7. No interest given on arrears of a voluntary annuity.

'Nor without a very special case, on arrears of annuities in general; or on arrears of maintenance, simple contract debts, &c. *Duke of Bedford v. Coke.* 310

8. Interest not allowed on arrears of jointure, except in a very special case; and it has been refused in very hard cases.

Anonymous, 458; and *Duke of Bedford v. Coke.* 310

9. Interest on a banker's note from circumstances, though no evidence of an agreement for it. *Jacomb v. Harwood.* 358 &c.

10. Demand of interest on arrears of an annuity *waived*, as *not likely to prevail under the circumstances.* *Morris v. Dillingham.* 339

11. As to rate of interest.

Denton v. Shellard. 351

12. Under a trust term, by deed, to pay debts and legacies, held, that simple contract debts did not carry interest. So likewise as to a will. *Contrà*, however, if by any act in the nature of

a specialty from whence an intention can be inferred, as if the debts be annexed by way of schedule. Page 379

13. Scrivener, &c. receiving money, and giving a note to place it out at interest, *is bound* to do so, and is not discharged from paying interest for it, unless his employer *accepts* the security and interest.

Balance of an account stated by such scrivener, &c, will carry interest. *Barwell v. Parker.* 380

14. *Generally speaking*, to warrant a reservation of *interest on further directions*, it should have been directed on the original Decree.

The case, however, of a direction for a *trial at law* is an exception; and there may be others founded on the peculiar nature of a case. *Champ v. Moody.* 408

15. Interest computed on various sums reported due, and also on all arrears of interest (on other sums) and costs. But this was under very special circumstances. *Bickham v. Cross.* 409

16. Though in general cases *portions out of real estate* carry interest *in their nature* without particular mention, yet after a great length of time and some laches, &c. the commencement of interest was fixed

fixed from the time of the sum to be raised having become a duty decreed on a former occasion. *E. Pomfret v. Lord Windsor*. Page 411 &c.

17. Lessor covenants for quiet enjoyment, and devises his estate in trust to pay debts. Lessees, being evicted, recover against his executors, and assign the judgment. This is a debt by specialty; and the assignees are entitled to interest. *E. of Bath v. E. Bradford*.

443

INTERROGATORIES.

A party to a cause may be examined on new interrogatories in the Master's office without a new Order, the Master being the proper judge. In the case of a witness it is different, for under a commission to examine, there must be a new Order for new interrogatories. *Cowslade v. Cornish*. 360

ISSUE AT LAW.

See also TRIAL, NEW TRIAL, WILL, &c.

1. On quantum damnificatus by non performance of a covenant to rebuild houses. *City of London v. Nash*. 14

As to the propriety of a Court of Equity's interference in such a case. *Vide* page 15

2. Issues directed as to the forgery of a will and other instruments, and Decree on the result on the equity reserved. *Barnesly v. Powel*.

Page 77 & 132

3. All the witnesses to a will must be examined at Law, under an issue in a suit to establish a will. *Vide in Ogle v. Cook*. 106

4. Issues at Law on a forged will, &c. and Orders made after verdict. *Barnesly v. Powel*.

152 &c.

J.

JOINT-TENANCY.

See also TENANT IN COMMON.

1. Implied gift in the surviving interest of a lease which had been renewed by A. in the joint names of himself and brother, on the ground of intention, though proved but by one witness. *Maddison v. Andrew*.

45

2. A father having provided for his eldest son, but not for his other children, takes a security for the proceeds of an estate sold in the joint names of himself and eldest son. Held a trust for the father's personal representatives. *Pole v. Pole*.

55

JOINTURE.

JOINTURE.

1. The parties entitled to an estate, subject to jointure, upon confirming that jointure, are purchasers of the Jointress's interest in incumbrances paid off by her fortune, and assigned for the better security of her rights under the settlement. *Earl of Portsmouth v. Lady Suffolk, &c.* Page 23
2. Though an offer be made to confirm a widow's jointure, she is not obliged to discover the title deeds until the offer be effectuated. She must, however, state the date of her jointure deed, whether it was executed at that time, and the premises. *Leach v. Trollop.* 458

JURISDICTION.

See likewise EQUITY.

1. The Court of Chancery has no jurisdiction in charitable institutions regulated by charter, &c. *Attorney General v. Smart,* 53
Nor has it jurisdiction to interfere with the election of Members of Colleges, or misapplication of their funds, &c. where the appointment of a general visitor can be inferred. *Attorney General v. Talbot.* 58

2. Bill for an account does not lie on behalf of a master for the earnings of his apprentice, the remedy being at law. *Martin v. Martin.* Page 118
3. Plea to the jurisdiction. *Green v. Rutherford.* 212
4. Where trustees of a Charity have discretionary powers, the Court will not interpose unless they act corruptly.—Though it may not chuse to interpose, it does not follow that an information, seeking the Court's interference, will be dismissed; since it may be serviceable to maintain a controul over them.

Where there is, in point of substance, a visitor, it excludes the general interference of the Court, either by commission within the 43 Eliz. or its ordinary jurisdiction. *Attorney General v. Governor of Harrow School.* 429

5. As to the jurisdiction of Foreign Courts. A commission granted to examine at Paris as to the extent of jurisdiction of a particular Court erected there, but not as to the original constitution of it. *Gage v. Lady Stafford.* 430

LACHES.

L.

LACHES.

See LENGTH OF TIME.

1. As to neglect of a mortgagee in obtaining the title deeds. *Ryall v. Rowles.* Page 177
2. Injunction until hearing, to restrain an action by a bankrupt against the assignees under his commission, upon the ground of his long acquiescence under the commission. *Flower v. Herbert.* 374

LENGTH OF TIME.

See LACHES.

1. Length of time how far a bar to an account in Equity. 412
Though stale accounts are discouraged, yet an administrator *who was to see to the execution of a trust* out of real estate, and was accountable for the amount, was not allowed to take advantage of the length of time elapsed. *E. Pomfret v. Lord Windsor.* 411, &c.

LAPSE.

See LEGACY, RESIDUE, EXECUTOR, &c.

1. A bequest out of real estate

to be paid within 12 months after the death of A. The legatee survives A. but lives only one month after her; held not to have lapsed. *Hodgson v. Rawson.* Page 37

2. The benefit of a bequest forgiving a debt due from A. and directing a security for it to be given up, not lost by way of lapse, by the death of A. in the lifetime of the testatrix. *Sibthorp v. Moxton.* 59
3. Executory trust for three, for their lives as tenants in common; if any died without issue living at their deaths, their shares to go to survivors; with contingent remainders in tail; and remainders over.—Two of them dying in the lifetime of testatrix, held their shares lapsed and went over. *Sperling v. Toll.* 52
4. The nomination of a Master to a Charity-school not subject to the general rules of lapse, as in cases of presentations to Livings. *Attorney General v. Wycliffe.* 61
5. Bequest of a contingent interest in personalty, void where the preceding gift never vested, owing to a lapse. *Miller v. Faure.* 64
6. A person having power to appoint 4000*l.* to any of her kin; and for want of appointment, to go according to the statute, appoints

appoints it to her nephew "upon condition" that he paid his mother [*one of the next of kin*] an annuity; though the nephew died in her lifetime whereby the appointment as to him became void, his mother held entitled to her annuity. *Oke v. Heath.* Page 84

7. An ulterior appointment to a niece "*of all the rest, &c. of what she had power to dispose of,*" held to pass the residue of the above sum which had thus lapsed. *ibid.*

8. Grant of personal estate by deed to trustees, for a niece after the death of the grantor, passes to her representatives, although the niece died in the grantor's lifetime. *Peck v. Parrot.* 134

9. A testator having desired J. "*to leave*" D. 500*l.* at her death, out of the money bequeathed her, and D. having died in J.'s lifetime, after surviving the testator; held that such bequest did not thereby lapse; amounting to a legacy from the original testator. *Medlicot v. Bowes.* 116

10. Devise of 30,000*l.* to testator's wife for life, and afterward to be distributed among his children, as she by deed, will, or instrument in nature of a will, should appoint. She, having married again, appoints by will (*inter alia*) unto two of

the children who died in her lifetime. Held that their representatives were not entitled; and that the shares so appointed to them lapsed, and fell into the residue. *D. of Marlborough v. Lord Godolphin.*

Page 292

LEASEHOLDS.

As to the contribution and appointment towards renewals of leases. *Verney v. Verney.*

199

LEGITIMACY.

See *Baker v. Hart.*

26

LEGACIES.

See also EXECUTORS, LEGATEES, &c. &c.

1. A bequest out of real estate, to be paid within 12 months after the death of A. The legatee survives A. but lives only one month after her. Held not to have lapsed. *Hodgson v. Rawson.* 37

2. Legacy given to the children of S. she then having but one; held for the benefit of all born, or to be born. *Maddison v. Andrew.* 45

3. A daughter being a creditor under

under her father the testator's marriage articles, and having a legacy bequeathed to *very near the amount*, an account was directed as to the testator's personal estate *at the respective times of making his will, and of his death.* *King v. Philips.*

Page 131

4. Legacy of stock—Erroneous description.—Satisfaction.

Door v. Geary. 139

5. Bequest of goods *on board a ship* is good, though they may have been afterwards removed, and were not on board at the testator's death.

Neither choses in action, nor securities for money, pass under a bequest of "*goods and chattels.*" *Chapman v. Hart.*

146. 147

6. Specific legacies of stock *et c contra.* *Avelyn v. Ward.* 195

7. Plate passes under a bequest of "household goods." *Stapleton v. Conway.* 197

8. A father, having to pay a legacy to his daughter, gives her a greater sum on her marriage, and no demand of the legacy, though knowledge of it during the daughter's life. This held a satisfaction, and the husband not entitled. *Seed v. Bradford.*

220

9. Construction as to legacies, specific and otherwise.

Bequest "of 400*l.* East India bonds," *under the circum-*

stances not specific; but a legacy of quantity, to be made good out of the general assets; the testatrix having repeatedly, in this bequest, omitted the word "my," which she had used in other bequests clearly specific; and having only one East India bond at her death.

Bequests of South Sea Stock, in parcels, to a larger amount than testatrix was possessed of, held specific, the bequest of the last parcel being called "*the remaining S. S. stock* standing in her name."

These legatees must abate in proportion *inter se.* *Sleech v. Thorington.* Page 437

10. Bequest "*to the two servants,*" that should live with testatrix at her death: she had *three* at that time, and all of them entitled. *Sleech v. Thorington.* *ibid.*

11. Specific legacy, *if existing*, the whole paid, though nothing left for pecuniary; *but if not existing the right is gone.*

A debt specifically bequeathed, and afterwards voluntarily paid in, no ademption of the legacy; if a compulsory payment, it may or may not be an ademption according to circumstances; for if a particular reason is given, or if replaced on same fund, or so ordered, it is no ademption.

Bequest

1. Bequest of a note for 500l. "in the hands of F.;" when F. had laid it out in stock unknown to testatrix. Though the bequest of the note is specific, the legatee shall have the stock in which it is vested. *Drinkwater v. Fakner.*

Page 451

12. Bequest of a much larger legacy than a debt due from testator, on a condition which, by a subsequent deed, it became impossible to fulfil, held to be satisfaction, though it would not have been so from the will alone. Small circumstances will free such bequests from the rule of constructive satisfaction. *Mathews v. Mathews.*

456

See also *Clarke v. Guise.*

447

LEGATEES.

See also LEGACIES, RESIDUARY LEGATEE, &c.

1. A sale directed in favour of creditors, or a devise of "rents and profits" alone, and although contrary to the testator's intention. Held otherwise as to legatees, under the same instrument. *Baines v. Dixon.*

35

2. A legatee voluntarily paid by an executor not obliged to refund to the rest, except in the case of his insolvency; and it

seems, even as to that there is a distinction. *Orr v. Kaimes.*

Page 343

3. Real assets followed under administration bonds by legatees, creditors have no such right. *Ashly v. Bailie.* 382

4. As to whether residuary legatees paid by executors shall refund to legatees who were not paid immediately. *Moore v. Moore.* 445, 446

5. A testator reciting the amount of a debt he owed A. according to his own computation of it, directs such amount to be paid out of his real and personal estate, and bequeaths an annuity to A. for life out of his real and personal estates. Such creditor may enjoy the annuity, and be at liberty to dispute the testator's calculation of the debt. *Clarke v. Guise.* 447
Vide also *Mathews v. Mathews.* 455

LIEN.

See also ATTORNEY and CLIENT, CLERK in COURT, &c.

1. No lien on a ship, or the proceeds from sale of it, for repairs done at home. *Buxton v. Snee.* 86

2. Pawnees of goods permitting a bankrupt to continue in possession, or the order and disposition of them, have no specific lien
20

- lien against the assignees. *Ryall v. Rowles.* Page 176
3. See *Lord Townshend v. Windham.* 254
4. Bill of sale of a ship assigns the property. The contractor, who had been only paid half of the expences of the building, having thereby the legal and equitable interest, is entitled to be paid his whole demand; and the parties interested, or their estates, must settle their proportions and rights between themselves.—As to the lien of a vendor of real estate for the purchase money. *Walker v. Preswick.* 449

LIMITATION TOO REMOTE.

See also ESTATE-TAIL.

1. Interest of money given to A. for life, and for the heirs of his body, with a limitation over, if he died without issue A. takes the whole. *Butterfield v. Butterfield.* 83
2. A limitation over, "after legitimate heirs," too remote, unless capable of being confined to the period of the party's death. *Barret v. Beckford.* 230

LIMITATIONS.

(STATUTE OF.)

1. Bill lies by assignees of a

bankrupt for account and delivery of goods pledged by the bankrupt, notwithstanding the Statute of Limitations. *Kemp v. Westbrook.* Page 149

LUNATICS.

1. There is a difference in consideration of law and the strict rules of the Court as to the case of a lunatic being let in to take exceptions to a Master's Report after its being confirmed, and that of an infant, but it is equally open to the discretion of the Court in either case. *E. of Bath v. E. of Bradford.* 443
2. Specific performance of agreement decreed against one, who after entering into it, became a lunatic. *Owen v. Davies.*

61

As to various points and later statutes relative to lunatics. 61, 62, 63

3. In passing accounts of a lunatic's estate, notice should be given to the parties next entitled; but they are not allowed any costs.

Lunatic's comfort considered in exclusion to the presumptive rights of his next of kin, &c. Lunatic not stripped of support by act of the Lord Chancellor, even for creditors. *Ex parte Wright.* 275

4. A com-

4. A commission of lunacy was refused in respect of a person of merely weak understanding, and imbecile mind. *Lord Donegal's case.* Page 389
Sed vide ibid.

(LUNACY.

5. Commission of lunacy to inquire as to the lunacy of a person abroad, was directed where the party's mansion and more important estates lay. *Ex parte Southcot.* 389

M.

MAINTENANCE.

1. Though a tenant for life must keep down the interest of incumbrances, even if it exhausts the whole of the rents and profits, the Court will in some instances direct a reasonable maintenance for kin, if otherwise unprovided for. *Revel v. Watkinson.* 68
2. The Court will allow five per cent. interest on legacies given for maintenance; *which is an exception from its general rule.* 100, 118
3. Construction of will. Interest of legacy *from the death of the testator* on the manifest intent

as to maintenance. *Beckford v. Tobin.* Page 161

MAN, ISLE OF.

The statutes of wills *et de donis conditionalibus*, do not extend to the *Isle of Man*. That Island made unalienable by a private Act of Parliament against heirs general, on failure of issue male. *Bishop of Sodor and Man v. Earl of Derby.* 377

MARRIAGE.

Gift, *on condition to marry with consent*, where good, and where only *in terrorem.* *Berkeley v. Ryder.* 424

Provision by a brother in favour of sisters otherwise unprovided for, "upon their marrying with consent," construed *as if made by a father.* Such a provision *aliter, if made by a mere stranger.* *ibid.*

MARRIAGE (BROCADE).

See in Cole v. Gibson. 222

MISREPRESENTATION.

See also FRAUD, &c.

Stated accounts set aside, the
202 items

items being very gross, and obtained from a person just come of age, under a misrepresentation, and the party [a solicitor] charged with interest on monies directed to be laid out for the infant's benefit, notwithstanding a deed from its grandmother, that he should not be so chargeable. *Brown v. Pring.* Page 192

MISTAKE.

1. Marriage settlement rectified by a strict settlement, agreeably to the ordinary course, notwithstanding it agreed with the articles verbatim, and both made before marriage. The Plaintiff, however, having taken a benefit under the will, which he disputed, held to have made his election, and decreed to give up part of the settled estate in satisfaction. *Roberts v. Kingsley.* 135
2. Relief against agreement made under a misconception of rights. Agreement as to distribution of personal estate set aside, although ratified; the value appearing greater than was known to the Plaintiff at the time. *Cocking v. Pratt.* 187
3. General release from a sister to a brother not binding as to particular rights under the marriage settlement, or articles of the parents, the sister being ignorant of them, and the brother having covenanted that he was seised in fee, contrary to the fact.
Satisfaction. — The sister held entitled to her claims under the settlement or articles, and also to the consideration recited and expressed in the deed of release; the brother being a debtor to her to such amount on the face of it. A general release *with a particular consideration recited*, will be construed according to the particular recital. *Ramsden v. Hylton.* Page 369
4. Relief in Equity, on an instrument which had been drawn by mistake as a joint bond, and in respect of which the remedy at law was gone; the nature of the transaction implying the obligee's right to demand the consideration from the parties severally. The solvent obligor being dead, the demand available in equity both against his executor and heir, though the real estate was liable only in default of the personalty. Though a legal obligation and penalty may have become void at law, the condition of it is considered in equity, as an agreement to pay, regard being had to the nature of the consideration. *Bishop v. Church.* 303, 383

MODUS

MODUS.

1. Vicar failing in a suit for tithes in kind, and a *modus* set up, which was good in its nature, though imperfectly pleaded, may yet recover in that suit the arrears due under such *modus*. *Carte v. Ball*. Page 4
2. It is not absolutely necessary that the word "*modus*" should be used in laying one, nor a particular day for its payment stated.
The question of *rankness* of a *modus*, is *one of fact*, and not an objection *prima facie* in point of law. A Court of Equity *will* sometimes take upon itself to decide thereon in the first instance; *where quite clear*. But it generally leaves it to be tried at law. *Richards v. Evans*. 33
3. As to the distinction between a *modus* for tithes of particular things, and a *farm-modus*. 34
4. A doubtful *modus* not determined by a Court of Equity, without a trial at law. *Chapman v. Smith*. 417
5. An exception in the alleged *modus* that it was not to be paid *when the land was planted with hops*, not fatal in point of law on the face of it. *Ibid.*

MORTGAGE.

See also INCUMBRANCE, PRIORITIES, &c.

1. If redemption of mortgage be resisted, when it should not, mortgagees will be ordered to pay costs. *Baker v. Wind*.
Page 90
2. Where the question of mortgage or absolute conveyance had been decided against the mortgagee in an issue, he was, on motion, directed to pay the costs *forthwith*, and not allowed to set them off in account. 90
3. As to neglect of a mortgagee in obtaining the title deeds. *Ryall v. Rowles*. 177
4. Husband of tenant in tail takes in a mortgage, and is in receipt of the rents and profits. On a bill to redeem by the reversioner after the wife's death, no interest allowed to the husband during his wife's lifetime. *Amsbury v. Brown*. 213
As to tenant in tail keeping down the interest of an incumbrance. *ibid.*
5. A mortgagee, being before the Court, not sent to avail himself of his securities at law, since the matter must finally come round to the same end on a bill to redeem. *Jacomb v. Harwood*. 358, 359
6. Order made in favour of mortgagees, who had consented to a sale, in case the parties should delay it. 369, 370
7. Held

7. Held that a plea of foreclosure is *not good without the foreclosure has been made absolute.*

Though a mortgagee is not bound to discover his title deeds, *where he denies notice, he must not only deny notice in general, but all special facts and circumstances charged relating to it.* *Senhouse v. Earl.*

Page 401

8. A second mortgagee, *with notice of a former mortgage, but without notice of a former trust-charge, antecedent to both, and of which the former mortgagee had notice, was obliged to take, subject to that charge.* *Earl of Pomfret v. Lord Windsor.* 411, 412

9. Tacking.—A third incumbrancer may, *pendente lite, and before a Decree*, gain a priority over the second, by taking in the first. Such thing, however, not allowed after a decree settling the priorities. Demurrer allowed on the latter ground.

Bill of review on new matter must be on leave of the Court, and affidavit shewing the party's right; that it was not known to him at the time of the decree, or since such other time as he could have used it for his advantage in the former cause. *Wortly v. Birkhead.* 440

10. A prior mortgagee may tack a subsequent judgment; but a prior judgment creditor obtaining a subsequent mortgage, cannot.

A prior mortgagee, however, cannot tack a bond debt against the mortgagee, his assignee of the equity of redemption, or creditors; though he may as against the mortgagee's heir, to prevent a circuity. *Anonymous.*

Page 458-9

MORTMAIN.

See also CHARITIES.

1. Assets not marshalled in favour of a charitable bequest, void under the Mortmain Acts. *Arnold v. Chapman.* 74
2. Devise before the Mortmain Act, and Codicil after it, not disturbing the charitable trust, but devising to the same use, and adding other trustees, *not* rendered void, though the codicil attempted to unite another piece of land. *Willet v. Sandford.* 106
3. The Court refused to effectuate an order, which had confirmed the Master's Report, where the subject matter of it arose upon an evident attempt in a testator to evade the Statutes of Mortmain. *Attorney-General v. Day.* 121
4. De-

4. Devise to a charity, *before the Statute of Mortmain*, of copyholds, *unsurrendered*, held good. *Attorney-General v. Andrews.* Page 121
5. Void devise, under the Mortmain Acts. *Durour v. Motteux.* 165
6. Devise of a house to a college, not for academical or collegiate purposes, but merely to make it unalienable; *held void.* *Attorney-General v. Whorwood.* 247
7. Right of the Crown to direct the uses of a charity contrary to law; or where the purposes expressed are too general and indefinite. 248
8. Devise to a charity by mortgagee in possession of all monies due on his securities, is within the Mortmain Act, 9 Geo II. c. 36. So likewise of turnpike-tolls, and money on security of poor's-rates and county-rates. *Attorney-General v. Meyrick.* 282
9. Mortmain, stat. 9 Geo. II. c. 36.
Bequest of residue of personal estate in trust, "*to erect an hospital,*" *decided here* not to be void; it not being given to be laid out in land. And *held here* that in such case, the word "*erect*" did not of necessity imply "*to build*;" but only imported the foundation
- of a charitable institution metaphorically. *Vaughan v. Farrer.* Page 341
But settled now contra.
Vide *ibid.* and 426
10. After a bequest, before the Mortmain Act of 50l. charged on land to *P. J. the minister of a Baptist meeting-house*, certain other premises were devised away, charged with an annuity of 10l. "*to the minister belonging to that meeting-house.*" This held a valid charitable bequest for the ministers *in succession*, and not personal to *P. J.* *Attorney General v. Cook.* 363
11. Lord Hardwicke's opinion in the *latter part* of the judgment has been over-ruled, and the term "*erecting,*" as applied to charities, is *now held* to mean the *substantial part of the gift*, not the mere building of any tenements, &c. *Attorney General v. Bowles.* 426
Vide also 341

N.

NE EXEAT REGNO.

The affidavit to ground a writ of *ne exeat regno*, must not only state

state that the defendant is equitably indebted in a specific sum, but must mention the facts on which it arises, &c.

Anonymous. Page 414

NEW TRIAL.

Vide also ISSUE, TRIAL, &c.

1. See in *Baker v. Hart.* 26
2. No new trial where there must be the same issues, and no surprise, &c. on the former trial. Infancy no ground for it in such a case. Length of time a very great objection to such an application, both at law and in equity. A verdict founded on evidence discovered since the answer put in, and contrary to it, remains unprejudiced. *Legard v. Daly.* 112
3. New trial on forged instrument. Courts of Equity are much less strict in granting new trials than Courts of Law; *it being necessary, not* that the question should be decided to the satisfaction of others, though ever so often, but that the conscience of the Court itself should be quite satisfied. *Stace v. Mabbot.* 429

NEXT FRIEND.

See likewise INFANT, &c.

The next friend of an infant

allowed costs, though the bill had been dismissed; *the Master having previously reported the suit for the infant's benefit.* *Taner v. Ivie.* Page 407
Sed vide ibidem.

NEXT OF KIN.

See also INFANT, &c.

1. Residue undisposed of, held vested in executors beneficially, and no resulting trust for the next of kin, *although the executors had legacies given them. In this case the executors were infants, and the legacies specific, distinct, and unequal.* *Blinkhorn v. Feast.* 276
2. Testator, manifesting an intention to dispose of the residue, but leaving it inchoate, inasmuch as he did not name the residuary legatee; it was held that the executors were not entitled to the surplus. Where parol evidence can be read to show no resulting trust, like evidence may be read contra, to disprove the implication from the former. Legacy to one alone of two (or more) executors will not exclude either. Legacy to the daughter, &c. of an executor is not to be deemed a legacy to him, so as to prevent his taking the surplus, merely for that reason. *Bishop of Cloyne v. Young.* 300
3. Legacy

3. Legacy to next of kin, as well as to executors, though to ever so small an amount, does not exclude the next of kin from the residue. Legacy *does exclude* executors in general; though not universally. *Andrew v. Clark.* Page 332

4. Testator having appointed his wife and the Defendant executors, and given his wife certain specific articles, and his wife having died in his lifetime, the Defendant held entitled to the whole residue, comprising those articles as lapsed; and the bill of the next of kin was dismissed; but without costs. Devise of a real estate in fee to the wife of surviving executor, no objection to his taking the residue of the personalty. Sir J. Strange, M. R. held that executor, *as such*, takes all that is not disposed of, whether by lapse or otherwise, unless a contrary intent is clearly shewn; calling him a "*legal residuary legatee*." *Wilson v. Ivat.* 335

5. Distinction between an executor, *as such*, taking a *lapsed residue* and a *lapsed legacy*. Held that he does not take the former. As to the latter, *quere.* 336

6. Bequest of residue to go over in a particular event (which took place) to . . . (leaving a blank.)

The executors excluded by such inchoate gift, and the next of kin entitled.

Next of kin not excluded from taking the residue by legacies bequeathed to them. *Lord North and Guildford v. Purdon.* Page 416

NOTICE.

1. The agent of a party having notice of incumbrances, &c. induces a necessity for that party to make all due enquiries, &c. as to the title; and such person cannot afterwards protect himself by procuring the legal estate. *Maddox v. Maddox.* 46

2. Notice to an attorney of a prior conveyance unregistered, will postpone a conveyance for the benefit of his client, which has been registered. *Le Neve v. Le Neve.* 49

Notice to an attorney, agent, &c. in the same cause or matter, is notice to the client or party. *ibid.*

3. Purchaser of an equitable title to a rent charge, claiming against purchasers of the land for valuable consideration, without notice, must try his title at law in the name of his vendors. What shall amount to notice. *Whitfield v. Fawcett.* 180

4. In

4. In passing accounts of lunatic's estate, *notice* should be given to the parties next entitled; but they are not allowed any costs. *Ex parte Wright.* Page 275
5. A second mortgagee, *with notice of a former mortgage, but without notice of a former trust charge, antecedent to both, and of which the former mortgagee had notice, was obliged to take, subject to that charge.* *Earl Promfret v. Lord Windsor.* 411, 413
6. After a Decree for an account in a suit by parties interested in the surplus, where due proceedings take place between the Plaintiffs and Defendants, there is no occasion to give notice to creditors. *Costs* having been given here in the first instance, they were to be *paid before debts, &c.* *Hare v. Rose.* 435

O.

OFFICE.

The grant of a menial office in the House of Lords, for a term of years, liable to creditors, and a daily fee or allowance held liable also. *Schellinger v. Blackerby.* 172

P.

PARTIES.

See also PLEADING and PRACTICE, &c.

1. To a bill by representative of the pawnee of a chattel against a third person, *merely for the delivery of it*, the owner need not be a party. *Saville v. Tankred.* Page 72
2. In a suit relative to a testator's personal estate, it is unnecessary to make any other parties than the executor, he sustaining the person and power of the testator to defend for himself, legatees, and creditors. *Peacock v. Monk.* 82
3. A party to a cause may be examined on new interrogatories in the Master's office without a new Order, the Master being the proper judge. In the case of a *witness* it is different, for *under a commission* to examine, there must be a new Order for new interrogatories. *Cowlade v. Cornish.* 360
4. Demurrer for want of parties. Part of a ship's crew appointed two to be agents. On a bill for an account by such agents in their own names, and not "*on behalf of themselves and the rest,*" a demurrer was allowed for not having made the

- the whole crew parties. *Leigh v. Thomas.* Page 371
5. On a bill by devisee to redeem, the heir at law an unnecessary party. *Lewis v. Nangle.* 398
6. See *Walker v. Preswick.* 449, 450

PARTITION.

Partition will be decreed in Equity as to tithes. *Baxter v. Knollys.* 216

PARTNERSHIP.

1. Mutual credit under partnership agreement. *Welford v. Bezely.* 6 and 7
2. Representatives of partner entitled to set off debts, and have all allowances, before the separate creditors of the other can take his share; and they have a lien for such demands. *West v. Skip.* 135
3. Though it was held in *Sansum v. Braggington*, p. 202, and *Doddington v. Hallet*, p. 216, that part owners in a ship should be considered as partners, *the law is now otherwise.* Vide pages 204. 216.
4. Equities as between solvent partners, &c. and the estate of a bankrupt, &c. *Ryall v. Rowles.* 176
5. Articles of partnership do not

survive for the benefit of executors, &c. without an express provision for such purpose. The same as to assignees of bankrupts. The rights as between the parties in such instances, and through them the rights of their creditors. *Pearse v. Chamberlain.* Page 279

6. Judgment in action against a surviving partner, no extinguishment of the partnership debt in equity. *Jacomb v. Harwood.* 358

PART-OWNERS.

7. Though it was held in *Sansum v. Braggington*, p. 202, and *Doddington v. Hallett*, p. 216, that part-owners in a ship should be considered as partners, *the law is now otherwise.* 204. 216

PERFORMANCE.

See also COVENANT, SATISFACTION, &c.

1. A husband covenanting to grant his wife by deed or will 1000*l.* at his death, if she survive him, but dying intestate without having done so, held that she was not entitled to her distributive share in addition to her claim under the covenant. *Lee v. D'Aranda [and Cox].* 1

As

As to the distinction between cases of satisfaction and of part performance, &c.

Page 3

2. The purchase of *houses in London, and of lands of the tenure of borough English*, held not to be a due execution of a covenant in marriage articles to purchase or settle "*lands of inheritance.*" *Pinnel v. Hallet.* 364

PERPETUITY.

Trust of the residue of a term with a double aspect, viz. settlement on marriage *by deed of a leasehold estate*, in trust for the husband and wife for life; and after the decease of the survivor, to be assigned by the trustees, *with the rents and profits*, to the eldest son; "and for want of *such issue of such son,*" to daughters.

A son having been born, who died without issue in the life of the mother, held *that it did not vest in him*, but was a good remainder to an only daughter at the death of the surviving parent.

The decree in this point affirmed on appeal, 2 Ves. 318. Courts will avoid a construction leading to a perpetuity and void devise, if possible. So they will, in marriage settlements, consider the general in-

tent as in favour of the issue described, and not let property revert, or go to a father as the representative of one child to the prejudice of the rest, if no positive reason for it to be clearly inferred. *Erel v. Wallace.* Page 312, 313

PERSONAL ESTATE.

See also RESIDUE, &c.

Redeemable annuities for the life of grantee, secured by terms for years, taken in satisfaction of a debt, held part of the grantee's personal estate, and similar to Welsh mortgages. *Longuet v. Scawen.* 191

PLEADING.

1. A specific charge that the plaintiff's title would appear as stated, contrary to one alleged to be insisted on by the defendant, must be met by plea or answer; and not being so, a general demurrer was overruled. *Stroud v. Deacon.* 32
2. It is not absolutely necessary to use the word "*modus,*" in laying one, nor to state a particular day of its payment. *Richards v. Evans.* 33
3. In order to bind "*assigns*" or "*heirs,*"

- "heirs," under a covenant, the bill must state them to be so bound, or it will be demurrable. Page 44
4. Plea that the Chancellor of the University of Oxford was visitor of one of the Colleges, held good to the whole of the relief and discovery. See the plea set forth, *Attorney General v. Talbot*. 58
5. To a bill by representative of the pawnee of a chattel, against a third person, merely for the delivery of it, the owner need not be a party. *Sanille v. Tankred*. 72
6. A plea to the jurisdiction of the Court, must shew what other Court has jurisdiction. *Earl of Derby v. Duke of Athol*. 114
7. Plea of a general agreement and composition of accounts, good, without its being a minute strict settlement of items. *Sewell v. Bridge*. 160
8. A plea allowed to a bill for an account of an intestate's personal estate; of an inventory delivered, and approved, and of an agreement thereon founded, without fraud, &c. *Cooking v. Pratt*. 189
9. If a bill charges a party to be interested, who, if not so, would be properly examinable as a witness, the defendant cannot demur, but must plead, and support it by an answer, denying such charge. *Plummer v. May*. Page 196
10. Plea to the jurisdiction. *Green v. Ratherforth*. 212
11. The interrogating part of a bill must be supported by a substantive charge. *Attorney General v. Whorwood*. 247
12. As a plea containing an exception of matters thereafter mentioned, is bad, and must be over-ruled; so a plea of a release "further and other than in the plea set forth," is incorrect, though not so much as to over-rule it. *Salheld v. Science*. 303
13. Plea on the ground of forfeiture must be confined to protect against a discovery of the act causing it, and not extend to matters collateral. *Weaver v. Earl of Meath*. 306
14. Length of time proper for a plea, but not for a demurrer. *Gregor v. Molesworth*. 306
15. Bill of interpleader dismissed with costs, where the question could be determined in the principal suit. *Lloyd v. Tench*. 345
16. Plea allowed to discovery of a marriage which would subject one of the parties to punishment in the Ecclesiastical Court; the other being dead.
What averments are proper to support a plea.
Demurrer.—Questions, even of

of title, construction of will, &c. determined on demurrer, if quite clear on the face of the bill, that the determination must be on the same matters in the more protracted way at last. *Brownsword v. Edwards*. Page 353

17. Demurrer for want of parties.

Part of a ship's crew appointed two to be agents. On a bill for an account by such agents in their own names, and not "on behalf of themselves and the rest," a demurrer was allowed for not having made the whole crew parties.

Leigh v. Thomas. 371

18. Plea allowed as to discovery whether one from whom the defendant purchased was not a Papist. *Harrison v. Southcot*. 386

19. Plea good in part, and in part disallowed. Plea of the statute of limitations, not to the general account prayed, but to an account between plaintiff and his father in his life-time allowed, with an exception of one article. As to the plea of the statute on merchants accounts. *Welford v. Liddel*. 388

20. Lord *Hardwicke* held, that in the case of a bill for discovery of a Defendant's title, he might object to make such discovery by his answer, as well as by plea, &c. *Buden v. Dore*. 400

21. Held that a plea of foreclo-

sure is not good without the foreclosure has been made absolute.

Though a mortgagee is not bound to discover his title deeds, where he denies notice; he must not only deny notice in general, but all special facts and circumstances charged, relating to it. *Senhouse v. Earl*.

Page 401

22. A demurrer should precisely distinguish each part of the bill demurred to. Though parties may demur to discover any thing which may prove illicit cohabitation, or what may subject them to pains, penalties, or ecclesiastical censures, &c. a charge against persons of conspiracy, or attempt to set up a bastard child, is not demurrable unto; that not being, *per se*, an indictable offence.

Chetwynd v. Lindon. 403

23. A Decree cannot be pleaded, unless it has been signed and enrolled. *Kinsey v. Kinsey*.

441

24. Supplemental bill, in nature of a bill of review, must be accompanied with a petition to re-hear or appeal. *Moore v. Moore*. 445

25. Rule as to strict bills of review, is that the decree can be varied only upon errors complained of, except as to matters merely consequential upon the variation made. Same rule

rule as to appeals in the House of Lords. *Moore v. Moore.*

Page 446

PORCION.

See also SATISFACTION, &c.

1. Liberal construction in favour of the vesting of portions. Survivorship as between the children referred to their not attaining 21, or marriage, though no express words to that effect; there being a preceding clause as to other children, where the like words were used. *Mendes v. Mendes.* 67
2. As to satisfaction of portions, see *Duke of Bridgewater v. Egerton.* 319
3. Trust "to raise" 5000*l.* portion "and pay it" to such younger child as the father should appoint; for want of appointment to the younger children at 21, with interest for their maintenance, &c. in the meantime, &c. &c. The only younger child died at two years old. Held *not* to be vested in him, so as to be claimed by the father as his representative. Portions by will governed by rules from the civil law, not applicable to a deed. *Hubert v. Parsons.* 357
4. Marriage settlement on husband and wife for life, and trust term, if no issue male, or

if all should die without issue male before 21 years, to raise portions for daughters, &c. A son attained 21, but died in father's life-time without issue male. The portions not raiseable.

- Where a term for securing portions has been *misplaced* in a settlement, &c. so as to be defeasible at law, it will be rectified in equity. *Worseley v. Earl of Granville.* Page 375
5. The vesting of, suspended during the father's life-time. *Loder v. Loder.* 424

POSTHUMOUS CHILD.

1. A posthumous child within a provision of marriage articles for such children of the marriage as should be living at the death of the father or mother. *Millar v. Turner.* 64
For various other points, see 64, 65
2. Posthumous brother of the half blood entitled under the Statute of Distributions. *Burnett v. Mann.* 88

POST-OBIT SECURITY, CONFIRMATION, &c.

See also EXPECTANCIES, &c.

1. *A.* aged 30, borrows 5000*l.* on bond to pay 10,000*l.* if he survives *B.* aged 78. *A.* survives a year

a year and eight months, having on death of *B.* confirmed the bargain by a new bond, &c. freely; and paying part. No relief given in this case, except as to the penalty.

Earl of Chesterfield v. Jansen.

Page 314

2. Courts of Equity more strict now in such cases, and in bargains for expectancies, than formerly. 314, 315

And *Evans v. Cheshire.*

317

POWER.

See also APPOINTMENT, &c.

1. A discretionary power given to executors, is not determined by the death of one of them. *Flanders v. Clark.* 12
2. Devise to *A.* in fee, with directions to settle on descendants of his mother for their several lives, &c. *A.* may limit an inheritance to effectuate the general intent. *Godolphin v. Godolphin.* 21
3. Power reserved by owner of the inheritance, substantially executed by an indirect charge, not referring to the power. *Maddison v. Andrew.* 45
4. A person having power to appoint 4000*l.* to any of her kin; and for want of appointment, to go according to the statute, appoints it to her nephew "upon condition" that he paid his mother [one of the next of kin] an annuity; though the nephew died in her lifetime whereby the appointment as to him became void, his mother held entitled to her annuity. *Oke v. Heath.* Page 84
- An ulterior appointment to a niece "of all the rest, &c. of what she had power to dispose of," held to pass the residue of the above sum which had thus lapsed. *ibid.*
5. Appointment pursuant to a power, good, though executed by will of a feme covert. *Burnet v. Mann.* 88
6. Power of appointment by a father, not well executed, according to a reasonable construction of the recital of the deed, which created the power. *Burleigh v. Pearson.* 151
7. Distinction between powers and absolute interests. A general power of appointment given over an estate in lieu of a present interest in it, having been executed voluntarily, though for a daughter, was held to be assets in favour of creditors. As to these assets, however, as between the creditors, it was held, that a creditor by judgment entered into for securing a portion given by the debtor on the marriage of his daughter, was entitled to a preference

- ence. *Lord Townshend v. Windham.* Page 254
8. Mere power unexecuted in a tenant for life, who becomes bankrupt, does not vest in his assignees. *ibid.*
9. Devise of 30,000*l.* to testator's wife for life, and afterward to be distributed among his children, as she by deed, will, or instrument in nature of a will, should appoint. She, having married again, appoints by will (*inter alia*) unto two of the children who died in her lifetime. Held that their representatives were not entitled; and that the shares so appointed to them lapsed, and fell into the residue. *D. of Marlborough v. Lord Godolphin.* 292
10. Appointee under a power, must claim not only under the power, but according to the nature of the instrument under which it is executed. If an instrument is to operate as a will for the execution of a power, it must have all the incident consequences of a will. In the case of a will to pass lands by virtue of a power, it must be executed according to the provisions of the Statute of Frauds. And so in the case of a testament to pass personally under a power, it must be such an instrument as is capable in its own nature of passing personal estate.

So in the case of copyholds surrendered to the use of a will, and certain uses appointed by will, if the appointee die in the testator's life-time, his representative cannot take any benefit; although the rule is generally, that copyhold lands pass by the surrender. The reason is, that the act is not complete in such case, from the non-operation of the will in the testator's life-time.

When the execution of a power is by will and is not expressed in the precise words which would be required in a deed; as under a clear intent to create an estate tail, though not formally worded, there the Court will effectuate such intent, notwithstanding the appointee takes, in some sense, under the power.

And so in like cases where, in any power, there is also one of revocation, and to appoint new uses, and the power itself is executed without any like reservation of a new power to revoke, the act (if substantive from the nature of the instrument) is irrevocable.

Appointee under a power, takes *under the authority* of that power, as if therein mentioned, in so far as relates to the *substance* of the benefit; *but he does not take as from the*

time when the power was created.

Mere powers construed strictly:—Powers coupled with an interest construed liberally. *D. of Marlborough v. Lord Godolphin.* Page 292, &c.

11. Father tenant for life, and two sons, article to charge [an estate] with a sum for younger children after the father's death, as he by will, *duly executed*, should direct. He directs by will *with two witnesses only*. *A good execution of the Power*, nothing passing from the father. Otherwise, if by owner of the estate. *Jones v. Clough.* *Sed Quare?* 3

12. In the exercise of a power to appoint amongst children, each must have a part, not illusory, nor reversionary: but a particular interest, as for life, may be given to any. Such a power will not extend to grandchildren; nor can a discretion be given to another to make the appointment. Though such an attempt would be void, *it would not devolve on the Court to appoint*. The Court only interferes, where the power is well created, but by accident cannot be executed at all. *Alexander v. Alexander.* 456

13. Where given to those not capable, together with another

who is capable, the latter will take the whole. Under such a power, it cannot be given free from the debts of the appointee. Page 456

PRACTICE.

See PUBLICATION, &c.

1. Though an information relative to a charitable use will not be dismissed, on any formal grounds, where a clear right is to be settled, it will yet be dismissed with costs, if no charitable funds in question, and no distinct ground made out in proof, for the Court's interference. *Attorney-General v. Parker.* 36
2. Though an information relative to a charity, *where the subject is fit, and the Court has proper jurisdiction*, will not be dismissed because it prays *wrong relief*, &c. it is otherwise in many cases where the Court may not think proper to interpose; and an information will always be dismissed with costs if the Court has not properly full Jurisdiction, as in Foundations under a charter, &c. *Attorney-General v. Smart.* 53
3. As to the late act for the regulation of charities on petition only. 53
4. There must always be some relators

- relators before the Court to answer for the costs in charity matters. Page 53
5. As to the Practice of the Six Clerks' Office, and the necessity for Bills to be entered in the *Bill-book* to warrant an attachment for non-appearance. 42
- Another Book is kept at the Six Clerks Office for entry of Bills *not filed*, in order that Defendants who have appeared in such suits may "*prefer costs*." 42
- Attachment for non-appearance irregular if the Bill is not entered in the *Bill-book* in the Six Clerks Office. 42
6. The Court often gives credit to the answer of one party even against another, as to make it the foundation of an Inquiry. *Le Neve v. Le Neve*. 49
7. Voluntary release by a party to his adversary not to defeat the Clerk in Court of his lien for costs. If the suit had ended on a *bond fide* compromise for a reasonable consideration paid, it would have been otherwise. *Anonymous*. 275
8. As to the rights and remedies of Six Clerks, and Clerks in Court, for their fees, their lien on papers, &c. Whether Six Clerk can stop proceedings until paid his fees which had been paid to the Clerk in Court of his division, who had absconded. *Taylor v. Lewis*. Page 307
9. Clerk in Court cannot be changed at the mere will of a party. *Taylor v. Lewis*. 308
10. Orders for service of process discretionary.
- Where neither the party nor her Clerk in Court, could be found, the Court ordered that the service of a subpoena to hear judgment, on her Solicitor, should be deemed good service, if accompanied by a copy of the Order left at the last place of abode. *Anonymous*. 271
11. Costs are refunded upon the reversal of an Order which had allowed a demurrer. *Oates v. Chapman*. 253, 302
12. If Plaintiff is abroad, and the Defendant becomes apprized of it, he cannot obtain security for costs, if he afterwards takes any other step in the cause; such as applying for time to answer, &c. *Melioruchy v. Same*. 274
13. Defendant in custody for want of further answer, putting it in, will be discharged on paying the costs of the contempt. If that answer, or any further one, proves to be insufficient, the Plaintiff *may resume the process* where it left off. *Child v. Brabson*. 307

14. Revivor is allowed for *costs taxed*. Costs die with the party unless taxed; and even where taxed in the lifetime of such party, and the person to pay them is in prison, he will be discharged unless there be a revivor within a reasonable time; this is in like manner as in a case of sequestration. Difference between process at Law and Equity.

Process in Equity is in *personam*, for a contempt; not so at Law.

Writs of execution at Law, and writs of Fi. Fa. do not abate.

Writ of sequestration in Equity does abate. The Court, however, will allow time to revive.

Process of sequestration in Equity *nearly* resembles that of Fi. Fa. at Law; but there is the above *material* distinction, in case of the party's death. *White v. Hayward*.

Page 406

15. Though the strict rule be, not to allow revivor merely for costs, which have not been taxed, the Court leans against enforcing it, *if there be any thing in the Decree yet remaining to be executed*. *Johnson v. Peck*.

407

16. The antient sum of 40*l.* as the amount in which security must be given to answer costs

on the Plaintiff's residing abroad, is not increased under adverse motion on *any special circumstances*. If, however, such a Plaintiff asks a favour of the Court, further terms may be imposed on him. *Gage v. Lady Stafford*. Page 434

17. No Decree in Equity on the testimony only of *one* witness, against a *positive* denial by answer, uninfluenced by other circumstances. 50

18. As to how far the answer of one Defendant may affect another Defendant. See 57

19. Though one witness cannot sustain a suit against a distinct denial by answer: *the latter must be precise and positive*. *Arnott v. Biscoe*. 69

20. A stated account and release being set aside, relief not given to the Defendant on a cross bill for another independent matter, until he should account fully in the original suit. *Skish v. Foster, et e contra*.

66

21. To a bill by representative of the pawnee of a chattel against a third person, *merely for the delivery of it*, the owner need not be a party. *Suville v. Tankred*. 72

22. In a suit relative to a testator's personal estate it is unnecessary to make any other parties than the executor, he sustaining

- sustaining the person and power of the testator to defend for himself, legatees, and creditors. *Peacock v. Monk.* Page 82
23. A purchaser or mortgagee under a Decree of the Court is answerable for the application of the money if not paid into Court. *Lloyd v. Baldwin.* 104
24. As to Bills pro confesso. *Wharam v. Broughton.* 107, 108
25. Confirmation of Master's Report opened, and the report allowed to be excepted to, or reviewed, under particular circumstances; although previous exceptions had been disallowed after argument. *Hawkins v. Day.* 109
26. Enrollment of a Decree set aside under particular circumstances; but not if made on the merits. *Kemp v. Squire.* 116
27. A demurrer may be put in after a plea is overruled. *East India Company v. Campbell.* 136
28. On reversing an Order for allowing demurrer, the costs are refunded. *Oates v. Chapman.* 253, 302
29. Enrollment of a Decree vacated, having been done too expeditiously. *Wright v. Wright.* 166
30. As to the process on a Decree for possession of land. Page 205
31. Husband being abroad, wife having appeared and obtained an Order to answer separately, whereby she freed herself from process of contempt, will not be allowed to have her own acts set aside. *Travers v. Bulkely.* 180
32. The whole line of process having been gone through against the plaintiff's husband, who had not appeared, is equal to the proceeding to outlawry at Law; and there may be a Decree for transfer of her separate property against the other Defendants who did appear. *Vanessen v. East India Company.* 181
33. As to reference to the Master to ascertain whether two suits are for the same matter or otherwise. *Gage v. Lord Stafford and Furness.* 254
34. As to the mode of computing the value of premises in the Master's office. See *Pinnell v. Hullet, & Ves.* 277.
35. Reference for scandal may be at any time; not so as to mere impertinence. Scandal includes impertinence; but a matter may be impertinent without being scandalous. Nothing scandalous that is strictly

ly relevant to the merits. *Fenhoulet v. Passavant*.

Page 274

36. After an original bill proceeded in, it is *not a motion of course* to enlarge publication on a cross bill; but notice must be given, &c. *Aylet v. Easy*.

376

37. A Defendant having become better apprised of any matters after putting in his answer, cannot contravene or question his own admissions, &c. on the subject by a cross bill. His proper course is to put the further facts on the record by way of supplemental answer. 425

38. After appearance, no special injunction (such as to stay the navigating of a ship) without notice. *Marasco v. Boiton*.

308

39. If injunction be dissolved on the merits, another cannot be obtained, as of course, on an amended or supplemental bill.

The injunction having issued irregularly, held the Defendant had not waived the objection by a mere application for time to answer the bill. Objections as to irregular process can only be waived by a party doing some act expressly founded on it, or amounting to a clear affirmance.

The result of a reference under an Order of the Court, viewed by the Court as a De-

cree; and even stronger, since it supersedes all errors but corruption or partiality. *Travers v. E. of Stafford*. Page 270

PRESENTATION.

Void Presentation to a Living from some of the trustees taking an undue advantage of the rest. *Attorney-General v. Scott*. 194

Trustees to present to a Living cannot make proxies to *chuse an incumbent*. *ibid*.

As to the distinction between a sale of goods, under a sequestration or decree, &c. and where not allowed in *mesne process*. See p. 107, 108

PRESUMPTION.

Owner of a rent-charge not to be presumed to have released it by suffering it to run largely in arrear; nor, without proof, to have done so to prejudice those in remainder. *Aston v. Aston*. 142

PRIORITIES.

See INCUMBRANCES, &c.

1. A second mortgagee, with notice of a former mortgage, but without notice of a former trust-charge, antecedent to both, and of which the former mortgagee

gagge had notice, was obliged to take, subject to that charge. *Earl of Pomfret v. Lord Windsor.* Page 411, 412

2. Deed of appointment of lands in a Register County pursuant to a power in a former deed *which was not registered*, postponed to a mortgage made subsequent to it, *and registered before it.* *Scrafton v. Quincey.* 391

3. A third incumbrancer may, *pendente lite*, and before a Decree, gain a priority over the second, by taking in the first. Such thing, however, not allowed after the decree settling the priorities. Demurrer allowed on the latter ground. Bill of review on new matter must be on leave of the Court, and affidavit shewing the party's right; that it was not known to him at the time of the decree, or since such other time as he could have used it for his advantage in the former cause. *Wortley v. Birkhead.* 440

4. A prior mortgagee may tack a subsequent judgment; but a prior judgment creditor obtaining a subsequent mortgage, cannot.

A prior mortgagee, however, cannot tack a bond debt against the mortgagee, his assignee of the equity of redemption, or creditors; though

he may as against the mortgagee's heir, to prevent a circuit. *Anonymous.*

Page 438-9

See also *Willoughby v. Willoughby.* 463-4

PRIVILEGE.

The objection as to the examination of Counsel, Attornies, Solicitors, &c. as witnesses, is not on the ground of any *personal privilege* in them, but for the sake of the client, or party concerned. Courts, therefore, both of Law and Equity, will stop such disclosure, or suppress such depositions, if made to the party's prejudice. 47

PROBATE.

A will relative (*inter alia*) to real estate having been found by a verdict at law to have been forged, the Defendant ordered to transmit and lodge the probate, &c. with the Registrar of the Ecclesiastical Court, &c. &c. *Barnesly v. Powell.* 152, 157, &c.

PROXY.

Trustees for the presentation to a living cannot make proxies to

to chuse an Incumbent; though if a choice were properly made, they might do so *for the mere purpose of signing the presentation.* *Attorney General v. Scott.* Page 194

PRINCIPAL AND AGENT.

Plaintiffs intending to lend money to their brother in the East Indies, pay it to his agent in England, who remits in bullion. The brother was dead when the advance was made: his executors send the value of the bullion back to England, where it is received by the father. The agent's authority being revoked by the death of his principal, held it was no loan to the brother. The Court declared that the proceeds so received by the father ought to be answered out of his estate: but the parties compromised the matter at a less sum. *Eyre v. Eyre.* 297

PRINCIPAL AND SURETY.

1. On the marriage of A. his sister advances him 600*l.* to make a present to his wife, and A. procures his father to give her a bond for the amount, payable at a month after his death. A. pays his sister interest during his father's lifetime, and

for the month afterwards. On a bill by the sister against the representatives of her father and her brother; held a debt on the estate of the father, not to be indemnified by A. And the Plaintiff was also decreed her costs out of her father's estate.

It would have been *otherwise* if such a transaction had been *between strangers.* *Hill v. Ballard.* Page 56

Accounts, memoranda, &c. of the father read in favour of his representatives, although objected to by the other Defendant. *Ibid.* 57

2. Second tenant in tail joins in a mortgage and bond with the first, who receives the money lent. Held to be only a surety, and the real estate not liable in aid of the personal estate of the first, although he had joined in hopes to prevent a recovery. Parol evidence of an agreement between the parties deemed inadmissible. *Robinson v. Gee.* 139

3. Bill of Surety in a bond to *have it assigned*, after having paid its amount, dismissed with costs, as useless. *Gamon v. Stone.* 170

4. A father, tenant for life, procured his son, who was tenant in tail, to join in raising money, which the father received and

and applied to his own use, decreed to exonerate the estate; the son being only in the nature of a surety for it as the debt of his father. *Piers v. Piers.* Page 231

PUBLICATION.

1. Where it is quite clear that an examination in chief is morally impossible, there may be a *publication of depositions* taken *de bene esse*. *Gason v. Wordsworth.* 373, 377
2. After an original bill proceeded in, it is *not a motion of course* to enlarge publication on a cross bill, but notice must be given, &c. *Aylet v. Easey.* 376
3. Depositions *de bene esse*, published saving just exceptions, the witnesses being dead before an opportunity to have examined them in chief, though there was *delay on both sides*. *Anonymous.* 416

PURCHASER.

1. Neither trustees, nor others in a confidential capacity, can derive advantage from a purchase on their own behalves, of the trust, or confided property. *Whelpdale v. Cookson.* 8, &c.
2. A Purchaser or mortgagee under a Decree of the Court, is answerable for the application of the money, if not paid

into Court. *Lloyd v. Baldwin.*

Page 104

3. Purchaser of an equitable title to a rent charge, claiming against some purchasers of the land for a valuable consideration, without notice, must try his title at law in the name of his vendors. *Whitfield v. Fawcett.* 180
4. Voluntary conveyance by a person *indebted at the time*, void against subsequent purchasers for valuable consideration, *and creditors*. *If the party is not indebted at the time*, and no fraud, it is good *against creditors*, though *not against purchasers*; by force of the statute 27 Eliz. c. 4. Difference between the statutes 13 Eliz. c. 5, and the 27 Eliz. c. 4. *Lord Townshend v. Windham.* 258
5. Purchaser for valuable consideration, without notice, is not bound by a private act of Parliament. 412

R.

RECEIVER.

1. The Court will not appoint a Receiver on bill by an heir at law against a devisee, unless there

there are strong circumstances.
Knight v. Duplessis. Page 165

RECITAL.

See CONSTRUCTION. (16, and
22.) Pages 151, 369, 370

RECOVERY.

1. As to Lord Eldon's Act, see
p. 105
2. Questions as to legal and
equitable recoveries, and trust-
tees to preserve contingent
remainders. *E. Portsmouth v.*
Lord Effingham. 201

REGISTRY ACTS.

1. As to the difference between
the Registry Acts in England
and those of Ireland. See p.
51
2. Deed of appointment of lands
in a register county pursuant
to a power in a former deed
which was not registered, post-
poned to a mortgage made
subsequent to it *and registered*
before it. *Scrafton v. Quincey*.
391

RELATIONS.

1. The word "Relations," *gene-*
rally speaking, does not in-

clude those by *affinity*. A wife,
therefore, does not answer such
a description in the ordinary
sense. See *Davies v. Baily*.
Page 63, 64

2. Bequest to "*near relations*,"
means those within the sta-
tute of distributions. *Whit-*
horn v. Harris. 432

RELEASE.

General release from a sister to
a brother not binding as to
particular rights under the
marriage settlement, or articles
of the parents, the sister being
ignorant of them, and the bro-
ther having covenanted that
he was seised in fee, contrary
to the fact.

Satisfaction. — The sister
held entitled to her claims un-
der the settlement or articles,
and also to the consideration
recited and expressed in the
deed of release; the brother
being a debtor to her to such
amount on the face of it. A
general release *with a particu-*
lar consideration recited, will
be construed according to the
particular recital. *Ramsden*
v. Hylton. 369

REMAINDER AND REMAINDER-MEN.

1. Devise to A. and his heirs;
and

- and if he died without heirs, remainder to B. The devise being clearly of a fee, the remainder over void. Tilburgh v. Barbut.* Page 67
2. Windfalls of timber and other casualties, to whom the property belongs. *Aston v. Aston.* 186
3. As to the right, powers, and duties of trustees to preserve contingent remainders. See in *Garth v. Cotton.* 244

RENEWALS.

As to contribution and apportionment towards renewals of leases. *Verney v. Verney.* 199

RENTS AND PROFITS.

1. Rents and profits undisposed of belong to the owner of the inheritance, or persons entitled to the enjoyment. *Hopkins v. Hopkins.* 145
2. As to accumulation of Rents and Profits. — Intermediate rents and profits will pass by a clear devise of *all the rest and residue* of real estate. *Gibson v. Lord Montfort.* 214, 215
3. Devise of “*rents, profits, and produce*” of West India Estates to be consigned to trustees, and applied by them in disencum-

- bering an estate in Scotland of debts, and also in payment of other debts, funeral expences, and legacies. Held on rehearing, that such charges could only be paid out of the *annual perception of rents and profits*; and that part of the former Decree which had directed a sale was reversed. *Conyngham v. Conyngham.* Page 232
4. Grant or devise of “rents and profits,” referable to a term in gross, or mere chattel interest, will pass the whole interest in the term without further words of limitation: but it is otherwise as to a term carved out of an inheritance. *Belt v. Mitchelson.* 238

RENT CHARGE.

As to a fine of land *not barring* a rent-charge issuing out of the land, and belonging to a third person. *Vide* p. 181

REPUBLICATION.

See also REVOCATION.

1. Republication by a codicil. *Potter v. Potter.* 202
2. Republication as to lands purchased after a will, by a codicil made after the purchase. *Gibson v. Lord Montfort.* 214, 215.

RESIDUE.

RESIDUE.

1. Residuary bequest of personally includes every thing, as a void bequest, or one that has lapsed. *Durour v. Motteux*.

Page 165

2. As to the difference of the word "*residue*," as relative to real or personal estate. A clear devise of *all the rest and residue* of real estate will pass intermediate rents and profits. *Gibson v. Lord Montford*.

214, 215

3. Residue undisposed of, held *vested in executors beneficially*, and no resulting trust for the next of kin, *although the executors had legacies given them. In this case the executors were infants, and the legacies specific, distinct, and unequal.* *Blinkhorn v. Feast*.

276

4. Testator, *manifesting an intention to dispose of the residue, but leaving it inchoate, inasmuch as he did not name the residuary legatee*; it was held that the executors were *not entitled to the surplus*. Where parol evidence can be read to show no resulting trust, like evidence may be read *contrà*, to disprove the implication from the former. *Legacy to one alone of two (or more) executors will not exclude either. Legacy to the daughter, &c. of an executor is not to be deemed*

a legacy to him, so as to prevent his taking the surplus, merely for that reason. *Bishop of Cloyne v. Young*. Page 300

5. Legacy to next of kin, as well as to executors, though to ever so small an amount, does not exclude the next of kin from the residue. *Legacy does exclude executors in general; though not universally.* *Andrew v. Clark*. 332

6. Testator reciting his intention to dispose of *all* his property, and that his daughter was likely to die [of a violent distemper], left his wife, *if she did die*, the revenue and dividends of such property; *but if his daughter lived*, directed that his wife should only have her dower; giving the residue and dividend to that daughter. If she died without children, testator gave his brother "*all that should be left*." The daughter *survived the testator*, but died of the same illness, without issue.—Held that the mother was still entitled for life; and that the words "*what should be left*," constituted a *good residuary bequest* to the brother. *Duhamel v. Ardorin*.

332

7. Testator having appointed his wife and the Defendant executors, and given his wife certain specific articles, and his wife having died in his lifetime,

time, the Defendant held entitled to the whole residue, comprising those articles as lapsed; and the bill of the next of kin was dismissed, but without costs. Devise of a real estate in fee to the wife of surviving executor, no objection to his taking the residue of the personalty. *Sir J. Strange, M. R.* held that executor, *as such*, takes all that is not disposed of, whether by lapse or otherwise, unless a contrary intent is clearly shewn; calling him a "legal residuary legatee."

Page 335

Distinction between an executor, *as such*, taking a lapsed residue, and a lapsed legacy. Held that he does not take the former. As to the latter, *quære*.

336

8. Testator intending to dispose of all his personal estate, gives the residue in fifth shares; but appoints his brother "*heir to whatever part of his estate should be unappropriated by his will*." One of the five shares lapsed in testator's lifetime. Held that the above was an ultimate *general residuary clause*; and comprised this, as including not merely what was not mentioned, but every thing not effectually given. *Jackson v. Kelly*.

365

9. Bequest of residue to go over in a particular event (which

took place) to
(leaving a blank.)

The executors excluded by such inchoate gift, and the next of kin entitled.

Next of kin not excluded from taking the residue by legacies bequeathed to them. *Lord North and Guildford v. Purdon*, Page 416

REVIEW, BILL OF.

1. As to a bill of review on new matter. *Earl of Portsmouth v. Lord Effingham*. 200
Et vide Mr. Beames' complete and valuable edition of the Orders in Chancery, p. 2.
2. *Quære*, whether a demurrer will not lie to a supplemental bill, in nature of a bill of review, upon the discovery of new matter, on account of Plaintiff not having obtained leave of the Court, and made the usual deposit. *Cole v. Gibson*.

222

Et vide Mr. Beames' Orders in Chancery, 1, and notes, and 368, ibid.

3. A third incumbrancer may, *pendente lite*, and before a decree, gain a priority over the second, by taking the first. Such thing, however, not allowed after a decree settling the priorities. Demurrer allowed on the latter ground.

Bill

Bill of review on new matter must be on leave of the Court, and affidavit shewing the party's right, that it was not known to him at the time of the decree, or since such other time as he could have used it for his advantage in the former cause. *Wortley v. Birkhead*.

Page 440

REVIEW, COMMISSIONS OF.

From the Delegates of the Ecclesiastical Court, see p. 26.

REVIVOR.

See also ABATEMENT, COSTS, &c.

1. Though a cause be abated, money may be ordered to be paid out of Court without reviving the cause, upon the consent of all the parties actually interested. *Beard v. E. Powis*. 387

Sed vide ibid.

2. Revivor is allowed for costs *taxed*. They die with the party unless taxed; and even where taxed in the lifetime of such party, and the person who is to pay them is in prison, he will be discharged unless there be a revivor in a reasonable time. *White v. Hayward*.

406

Though the strict rule be not to allow revivor merely for costs, which have not been taxed, the Court leans against enforcing it, *if there be any thing in the decree yet remaining to be performed*.

Johnson v. Peck. Page 407

REVOCATION.

See also REPUBLICATION, &c.

1. Question as to the revocation of a will, *merely on the words*, sent to be tried at Law. *Attorney General v. Lloyd*. 29
2. As to revocation by marriage, and the birth of children, see p. 111.
3. Revocation of will, *pro tanto*, by a codicil directing a sale or mortgage to pay debts. *Verney v. Verney*. 199
4. After a devise of tithes, together with a real estate, a surrender of the lease under which they were held, and acceptance of a new lease, held to amount to a revocation; so that a republication was necessary. *Rudstone v. Anderson*. 393

SALE.

S.

SALE.

Devise of "*rents, profits, and produce*," of West India Estates to be consigned to trustees, and applied by them in disencumbering an estate in Scotland of debts; and also in payment of other debts, funeral expences, and legacies. Held, on re-hearing, that such charges could only be paid out of the annual perception of rents and profits; and that part of the former Decree which had directed a sale, was reversed. *Conyngham v. Conyngham*.

Page 232

Grant or devise of "*rents and profits*," referable to a term in gross, or mere chattel interest, will pass the whole interest in the term, without further words of limitation; but it is otherwise as to a term carved out of an inheritance. *Belt v. Mitchellson*.

238

SATISFACTION.

1. As to the distinction between cases of satisfaction, and of performance, or part-performance, of covenants, &c. 3
2. See *Goodwyn v. Goodwyn*.
122 [mispaged] 222

Door v. Geary. Page 139

And *Graham v. Graham*. 134

3. Marriage settlement rectified by a strict settlement, agreeably to the ordinary course, notwithstanding it agreed with the articles verbatim, and both made before marriage. The Plaintiff, however, having taken a benefit under the will, which he disputed, held to have made his election, and decreed to give up part of the settled estate in satisfaction.

Roberts v. Kingsley. 135

4. If a testator is chargeable with two annuities, and devises an annuity equal but to one, it will not be a satisfaction for either. Contrà where he is not a general debtor for both. *Graham v. Graham*. 141

5. Covenant in marriage articles to purchase and settle lands. Lands purchased and suffered to descend, taken in satisfaction of it. *Lewis v. Hill*. 148

Purchase of houses in London not a satisfaction of a covenant to purchase lands of inheritance. *ibid*.

And *S. P. Pinnel v. Hallet*.

364

The like as to lands in Borough English. *Idem*. 364

6. A sum charged on an Estate in Nevis in favour of *W.* held to be included in the bequest of a larger sum to *W.*'s younger children; the testatrix supposing

posing that they were entitled to the charge, though it was not the case: and decreed that no more should be raised than the sum bequeathed. *Stapleton v. Conway.* Page 197

7. A father, having to pay a legacy to his daughter, gives her a greater sum on her marriage, and no demand of the legacy, though knowledge of it during the daughter's life. This held a satisfaction, and the husband not entitled. *Seed v. Bradford.* 220

8. Testator being under an obligation to pay an annuity to *M. P.* bequeaths the residue of his estate for the benefit of his mother and *M. P.* for life. This is not to be considered in satisfaction of the annuity. *Barret v. Beckford.* 230

9. Devise of the residue of real and personal estate for life, held not to be a satisfaction for a sum articulated to be laid out in lands. *Alleyn v. Alleyn.* 280

10. Vide title "MISTAKE;" and *Ramsden v. Hylton.* 369

11. Land purchased and suffered to descend, decreed to be taken as a part performance and satisfaction of marriage articles. Election. *Hucks v. Hucks.* 438

12. A debtor bequeaths a much larger legacy, upon a condition, which by a subsequent

deed it becomes impossible to perform; by the will it would not have been a satisfaction, as it was for another purpose; but being freed from the condition by the deed, it is a satisfaction. General rule that a legacy larger than, or equal to, a debt is a constructive satisfaction; but any minute circumstance is laid hold of to take it out of that rule. *Mathews v. Mathews.* Page 455

SCANDAL.

See also IMPERTINENCE.

1. A reference for scandal may be at any time, and even by strangers to the record, &c. Not so as to impertinence. Scandal includes impertinence; but a matter may be impertinent without being scandalous. Nothing held scandalous that is strictly relevant to the merits. *Fenhoulet v. Passavant.* 274
2. Any record of the Court may be referred for scandal at any time; [and even by strangers to the suit]; but it is otherwise as to a reference for impertinence. Though such orders are discretionary to a certain extent, the opportunity may be lost or waived. *Anonymous.* 453, 454

SCHEDULE.

SCHEDULE.

See "INTEREST," and *Barwell v. Parker.* Page 379, 380

SEAMAN.

1. Sale of a seaman's prize-money, and subsequent agreement in confirmation of it, set aside. *Taylor v. Rochfort.*

365

2. Assignment of a sailor's share of prize money at an under-value, set aside for fraud; but still to stand as a security for what was really advanced.

The same equity as to an under assignment. *How v. Weldon.*

418

**SEQUESTRATION,
AND SALE OF GOODS.**

See in *Wharam v. Broughton,*

107

And in *White v. Hayward.*

406

SETT-OFF.

1. No set off on demands *en auter droit.* *Medlicot v. Bowes.*

116, 117

2. Relief in account, as to payments made to a bankrupt, after a secret act of bankruptcy, when the assignees had recovered by action payments made

by the bankrupt. *Billon v. Hyde.* Page 167

SETTLEMENT.

See also **CONSIDERATION.**

After marriage voluntary, settlement after marriage voluntary and void against creditors. *Beaumont v. Thorpe.*

25

Contrà if on fair consideration, though inadequate if no fraud or reasonable suspicion.

26

SHIP.

A Ship pledged abroad by the Master for repairs, &c. well hypothecated; and the Court held the part-owners liable each for the whole demand.

Sansum v. Braggington.

202

The law, however, has been since altered in the latter respect.

204, 205, 216

SOLICITOR.

See **ATTORNEY AND CLIENT,**
&c.

Solicitor in a cause charged with interest on money directed to be laid out for an infant's benefit, notwithstanding a deed from its grandmother, that he should not be so chargeable.

29

able. Stated accounts obtained by him, under a misrepresentation, set aside, the items being very gross. A bond obtained by him from the grandmother for the amount of fees and disbursements, decreed to stand only as a security for what was actually due on taxation. *Browne v. Pring*.

Page 192

STOCK.

See LEGACIES.

Specific legacies of stock *et c contra*. *Avelyn v. Ward*. 195

SURCHARGE, &c.

See also ACCOUNTS.

1. As to opening, setting aside, *surcharging and falsifying accounts, &c. &c.* *Townshend v. Lowfield*. 30, &c.
2. See *Allen v. Papworth*. 91, &c.

SURPLUS.

See RESIDUE, &c.

Surplus rents not included under the term "*portion*." *Vane v. Vane*. 45

SURRENDER.

See also COPYHOLDS.

1. Surrender of copyholds sup-

plied in favour of younger children. *Banks v. Denshire*.

Page 48

2. Trust of a copyhold devisable without a surrender. *Allen v. Poulton*. 78

As to another copyhold of which the testator had the legal estate, the heir put to his election. *ibid*.

SURVIVORSHIP.

See TENANT IN COMMON, and JOINT TENANT.

1. A discretionary power given to executors is not determined by the death of one of them. *Flanders v. Clark*. 12
2. Executory trust for three, for their lives, *as tenants in common*, if any died without issue living at their deaths, their shares to go to survivors with contingent remainders in tail; and remainders over. Two of them dying in the lifetime of testatrix, held their shares lapsed, and went over. *Sperling v. Toll*. 52
3. In a case of portions, survivorship, as between the children referred to their not attaining 21, or marriage, though no express words to that effect; there being a preceding clause as to other children where the like words were used. *Mendes v. Mendes*. 67
4. Bequest

4. Bequest of residue between two; one of them dying in testator's life-time, no survivorship, and his moiety is undisposed of. *Peat v. Chapman* [misnamed *Prat v. Chapman*]. Page 252
5. See *East v. Cook*. 277
- And PARTNERSHIP, *Pearce v. Chamberlain*. 279

T.

TACKING.

See MORTGAGE and PRIORITIES.

- A judgment creditor, having procured an assignment of a mortgage, allowed to tack the amount and costs. *Allen v. Papworth*. 91, &c.
See *Willoughby v. Willoughby*. 463

TENANT IN COMMON.

1. Devise of lands to four younger children equally, share and share alike *as tenants in common*, and not as joint-tenants "*with benefit of survivorship*." The latter words do not infringe the positive direction; and the survivorship confined to a particular period, applicable to

- the distribution of the personality. *Hawes v. Hawes*. Page 15
2. Executory trust for three, for their lives, *as tenants in common*; if any died without issue living at their deaths, their shares to go to survivors, with contingent remainders in tail, and remainders over. Two of them dying in the life-time of testatrix, held their shares lapsed, and went over. *Sperling v. Toll*. 52
 3. Devise to trustees, by sale or mortgage, to pay debts; the remainder to go, and *be equally divided* among three children, and the survivor of them and their heirs for ever; a tenancy in common. *Stones v. Heurtly*. 98
 4. Though specific performance of a contract might have been decreed against original parties, holding as tenants in common; yet where an alteration prevented a Decree as to one moiety, the court would not direct a performance as to the other; the contract being entire, and an execution of half of it inadequate to its prime object. *Attorney General v. Day*. 121
 5. Tenancy in common under a deed by a father in favour of his family, which was held to operate in the nature of a testamentary instrument. *Rigden v. Vallier*. 355

TENANT FOR LIFE.

1. Tenant for life must keep down the interest of incumbrances, though the whole of the rents and profits are exhausted by it. The Court will, however, in some instances, direct a reasonable maintenance thereout, if the tenant for life be otherwise unprovided for. *Revel v. Watkinson.* Page 68
2. Courts of Equity will restrain tenants for life, *without impeachment, &c. to a reasonable exercise* of their rights. *Aston v. Aston.* 142
3. Windfalls of timber and other casualties, to whom the property belongs. *Aston v. Aston.* 186
3. Questions as to infant tenants in tail, their personal representatives, &c. *Rook v. Worth.* Page 211
4. As to tenants in tail keeping down the interest of an incumbrance. 213
5. A father, tenant for life, procured his son, who was tenant in tail, to join in raising money, which the father received and applied to his own use, decreed to exonerate the estate; the son being only in the nature of a surety for it as the debt of his father. *Piers v. Piers.* 231
6. A tenant in tail coming into being after a sale of timber by agreement between a tenant for years, *without impeachment of waste, except voluntary waste*, and the ultimate reversioner, entitled to recover against what was received under it by the reversioner. *Garth v. Cotton.* 244

TENANT IN TAIL.

See also ESTATE-TAIL.

1. If a tenant in tail persists in refusing to execute his contract for sale, &c. and dies, the Court will not decree the succeeding tenant in tail to fulfil it; such a one taking *paramount.* *Attorney-General v. Day.* 121
2. Tenant in tail pays off an incumbrance, but takes no assignment. The remainder over, *under the circumstances*, subject to pay it to his representative. *Kirkham v. Smith.* 141
7. Books not heir-looms; and if limited to go with entailed lands, they become the property of the first tenant in tail. *Duke of Bridgewater v. Egerton.* 313

TENDER.

The right to principal and interest generally carries costs, and a tender must be very express

press and formal to prevent them in such a case. *Gammon v. Stone.* Page 170

TERM.

Grant or devise of "rents and profits," referable to a *term in gross, or mere chattel interest*, will pass *the whole interest* in the term without further words of limitation: *but it is otherwise as to a term carved out of an inheritance.* *Belt v. Mitchellson.* 298

TESTAMENT TESTAMENTARY ACT, &c.

1. A deed executed on the same day as a will, held a testamentary act. *Peacock v. Monk.* 82
2. A father by deed poll, reciting his intention of settling and assuring all his real and personal estate on his family *after his decease (inter alia)* grants, "*in consideration of natural love and affection,*" lands to two of his children and their heirs, "*to be equally divided between them,*" but does not make livery. This held to operate *in nature of a testamentary instrument*; and being made in consideration of natural love, &c. was held to amount to a *covenant to stand seised*. The children considered to take as te-

nants in common, both by the words used, and also from the nature of the provision. *Rigden v. Vallier.* Page 355

3. The word "*testament*" includes all testamentary instruments, as a will, codicils, &c.

The word "*instrument*" held to signify the will alone. *Ful-ler v. Hooper.* 352

4. Deed-poll by a father intending to settle real and personal estate on his family *after* his decease, without livery; held to operate as a testamentary instrument: and to amount also to a covenant to stand seised. *Rigden v. Vallier.* 355

5. A freeman on the same day with his will, by deed assigns part of his personal estate, in trust, to separate use of his daughter. He was then aged seventy-two; in the gout; and died in two days: the daughter had been married without consent; but he was reconciled. Held to be a testamentary disposition, in fraud of the custom, and that it might be disputed by the daughter's husband. Gift of personalty by freeman may be in life-time, or in *extremis, if he divests himself of the property*, and it is *enjoyed accordingly*; and if clearly not a testamentary act, *in fraud of the custom.* *Tomkyns v. Ladbroke.* 444

TIMBER.

TIMBER.

1. A tenant in tail coming into being after a sale of timber, by agreement between a tenant for years, *without impeachment of waste, except voluntary waste*, and the ultimate reversioner entitled to recover against what was received under it by the reversioner. *Garth v. Cotton.* Page 244
2. Guardian or trustee for an infant, who has a contingent estate, cannot cut timber of his own authority, though it may be fit for cutting, or even for a probable benefit. Though such an act may not amount to waste, he will be enjoined. *Knight v. Duplessis.* 379

TITLE.

The agent of a party having notice of incumbrances, &c. induces a necessity for that party to make all due enquiries, &c. as to the title; and such person cannot afterwards protect himself by procuring the legal estate. *Maddox v. Maddox.* 46

TRIAL AT LAW.

See also ISSUE, &c.

1. The fact of a marriage charged

by the bill, and denied by the parties' answers (there being evidence in the cause), must be tried at law; such matters being the proper subject for a jury. *Revel v. Fox.* Page 360

2. A doubtful modus not determined by a Court of Equity, without a trial at law. *Chapman v. Smith.* 417

TRUST, TRUSTEES, &c.

1. Trustees, or others in a confidential character, cannot derive advantage from a purchase of the trust, or confided property. *Whelpdale v. Cookson.* 8, &c.
2. A father having provided for his eldest son, but not for his other children, takes a security for the proceeds of an estate sold in the joint names of himself and eldest son. Held a trust for the father's personal representatives. *Pole v. Pole.* 55
3. Testator, on renewal of a lease took it in the names of his brother and himself, paying the fines and receiving the profits himself; held, on the ground of *intention, though proved but by one witness*, to be no constructive trust, but an implied gift of the surviving interest. *Maddison v. Andrew.* 45
4. Limitations apparently legal at

- as uses executed, held to be trusts, from the purposes to be answered. *Bagshaw v. Spencer.* Page 85
5. Trustees for the presentation to a living cannot make proxies to *chuse an Incumbent*; though if a choice were properly made, they might do so for the mere purpose of signing the presentation. *Attorney General v. Scott.* 194
6. It is not necessary that the word "*heirs*" should be inserted to carry the fee, where the purposes of a trust cannot be answered unless the trustees have a fee. *Gibson v. Lord Montfort.* 214
7. A trustee, with notice of his appointment as such, interfering with the subject matter, cannot repudiate the trust, and say he acted merely as a factor or agent. *Conyng- ham v. Conyngham.* 232
- 8 As to the *rights, powers, and duties of trustees to preserve contingent remainders*, see in *Garth v. Cotton.* 244
9. The remedy for a breach of trust is personal; and money produced by one, and laid out in an estate in Ireland, could not be specifically followed. The party's assets were, however, marshalled in favour of the claim. *Care v. Bateman.* 269
10. Trust deed, whereby trustees

were to give the residue of A.'s estate "*among his friends and relations where they should see most necessity, and as they should think most just.*"

Though in other cases the Court will not interpose where trustees, declining to act, have a power to distribute generally according to their discretion, *without any defined object*, it was held that here a rule was laid down; the word "*friends*" meaning "*relations*;" and that the Court could judge of the respective families' *necessities and occasions* by a reference to the Master. *Gower v. Mainwaring.* Page 297

11. *Quære*, whether a trustee or his heir can claim admittance to copyholds, or hold for their own benefit, where the cestuy qui trust has died without heirs.

It is a question whether trust estates in copyholds *escheat* to the Lord in such a case?

If they do, and the trustee has been admitted, it seems he would be considered as holding for the benefit of the Lord; and decreed to surrender.

If they do not *escheat*, the question is, *who* is entitled to the beneficial interest.

368, 369

It has been said, a Court of Equity

Equity would decree such an estate to be sold for the benefit of the next of kin; but that seems very doubtful. Page 369

Quære, therefore, whether, in such a case, the Lord could refuse the trustee admittance, and if compellable by law to admit him, he would not be entitled to the assistance of a Court of Equity? *ibid.*

12. Fine by persons in possession and non claim, the legal estate being in trustees, held not to bar an equitable charge under the deed of trust; though a great length of time had elapsed. *E. Pomsret v. Lord Windsor.* 411

13. Trust estate will pass by a general devise. 436

14. Infant trustee. — A Decree having been made for sale of an estate, that a trustee should join in the conveyance; that trustee dying, his infant heir bound to execute the conveyance, under the stat. 7 Ann, c. 19.

Such a Decree against the ancestor would obviate any doubt, as to whether his infant heir were, or not, a trustee within the act. *Hawkins v. Obeen.* 435

15. Though every trustee of part of the personal estate is not to be called to account by a particular pecuniary legatee, but only by the executor or ad-

ministratoꝝ; and though such trustee, who receives the trust money, and thereby becomes a debtor, is not to be considered and chargeable as executor, merely because he is so named in a will, yet where he is made a co-executor, and does not renounce whilst he receives the trust money, he is properly made a Defendant to a suit for a general account, and is accountable therein for his receipts; and *this* the more especially since his being named executor is a release of the debt at law. *Moore v. Moore.*

Page 445

16. Executors and administrators are considered as trustees in many instances. 412

17. Devise in trust to pay debts is not within the statute of fraudulent devises. S. P. 1 Bro. 311. Vide also Mr. Sanders's note to *Plunket v. Pension*, 2 Atk. 292.

Trustees to pay debts may fairly raise, by sale or mortgage, without waiting for a decree [no suit being instituted. *Earl of Bath v. Earl of Bradford.* 443

18. Where a trustee for an infant has money to lay out for his benefit, and employs it in his own trade, &c. the Court will exercise an option for the infant either to have interest or the

the profits made. *Anonymous.*
Page 452

TYTHES.

1. Vicar failing in a suit for tithes in kind, and a *modus* set up, which was good in its nature, though imperfectly pleaded, may yet recover in that suit the arrears due under such *modus*. *Carte v. Ball.* 4
2. Partition will be decreed in Equity as to tythes. *Baxter v. Knollys.* 216

U.

USURY.

1. In directing accounts, where there has been usury, extortion, or oppression, the Court often, by its decree, *directs every thing doubtful to be taken most strongly against the person guilty of such proceedings.* *Mitford v. Featherstonhaugh.* 399
2. Assignees of a bankrupt are not compellable to pay what is really due on a transaction attended with usury *under the general jurisdiction in bankruptcy.* It is otherwise where

they apply to a *Court of Equity* by a bill to be relieved. *Ex parte Skip.* Page 414

V.

VESTING.

1. Legacy to *A.* to be at her disposal, if she *married with consent*, and not otherwise. She dying *without having been married* at all, it was held never to have been vested. *Elton v. Elton.* 5
2. Legacy to *J. F.* under restrictions; the principal to be paid as "*the executors*" should *judge necessary* for him, and if he died without issue, to revert to testator's family; *with interest in the mean time for what should continue in their hands.*
This discretionary power held to be well executed by the will of a *surviving executrix.* *Flanders v. Clarke.* 12
3. Legacy to *E.* to be paid at 21, or marriage, but if she died before, then to the younger children of *F. E.* having died unmarried, under 21, held to vest in such of the younger children as were living at that time. *Ellison v. Airey.* 75
4. Legacy to *F.* when he shall attain

attain 25, with directions for its investment, *and payment of interest in the meantime* for education, and for part of the principal to be applied in placing him out. Held a vested interest, and transmissible, though he died under that age. *Fonnereau v. Fonnereau*.

Page 76

5. Bequest of 3000*l.* to *Jane*, the wife of *C.* for the use of her younger children, to be distributed as she should appoint, &c. All her children by *C.* being born at the date of the will, and death of testator, held vested as a present legacy to them, subject to variation *as between them*; and not to extend to children by *Jane's* future marriage. One, therefore, who was a younger child at the death of testator, held entitled, though he afterwards became an elder. *Coleman v. Seymour*. 118
6. Bequest of 400*l.* to *R.* to be paid in a year; *and a further sum of 100*l.* at the death of his mother*. This last also held vested. *Jackson v. Jackson*. 120
7. Bequest to younger children of testator's son, to be paid at 21; held vested in those born at the time of testator's death. *Horseley v. Chaloner*. 295
8. Bequest of residue of personal estate after a life interest to the use of all and

every the children of testator's daughter equally; *to be transferred, delivered, and paid* to them severally, when by law able to receive and give discharges. Held to be vested in each child on coming into being, and transmissible; though subject to be varied by the birth of others. *Erel v. Wallace*. Page 312

9. Trust of the residue of a term with a double aspect, viz. settlement on marriage *by deed of a leasehold estate*, in trust for the husband and wife for life; and after the decease of the survivor, to be assigned by the trustees, *with the rents and profits*, to the eldest son; "and for want of *such issue of such son*," to daughters.

A son having been born, who died without issue in the life of the mother, held *that it did not vest in him*, but was a good remainder to an only daughter at the death of the surviving parent.

The decree in this point affirmed on appeal, 2 Ves. 318. Courts will avoid a construction leading to a perpetuity and void devise, if possible. So they will, in marriage settlements, consider the general intent as in favour of the issue described, and not let property revert, or go to a father as the representative of one child to the

the prejudice of the rest, if no positive reason for it to be clearly inferred. *Exel v. Wallace*. Page 312, 313

10. Grandmother, under a power creates, by deed, a term to commence after her death, for raising money for *younger children*, as their father should appoint; if no appointment, equally; if but one besides *the eldest*, then to that one; if none except *the eldest*, then to him; if *no eldest son*, then to her own executors. At the date of the deed, there was one grandson and one granddaughter. The father afterwards had another son, and died without appointment. The eldest son having died under age, held that the whole sum belonged to the daughter, and that the younger son, having thus become an eldest son, was excluded. Elder son unprovided for considered as a younger. Vesting not suspended, in general, by a power to appoint.

Portions not to be raised for the representatives of a child, who died before it was naturally required. *Lord Teynham v. Webb*. 344

11. Trust "*to raise*" 5000*l.* portion "*and pay it*" to such younger child as the father should appoint; for want of appointment to the younger children

at 21, with interest for their maintenance, &c. in the meantime, &c. &c. The *only* younger child died at two years old. Held *not* to be vested in him, so as to be claimed by the father as his representative. Portions by will governed by rules from the civil law, not applicable to a deed. *Hubert v. Parsons*. Page 357

VOLUNTARY GIFTS, &c.

See also CREDITORS.

As to voluntary gifts amounting to a complete conveyance or transfer of the property, in order to be valid, &c. &c. see in *Peck v. Parrot*. 134

W.

WARD OF COURT.

See also GUARDIAN AND WARD.

Order on an attempt to marry a Ward of Court clandestinely. *Beard v. Travers*. 168

WARRANTY.

The word "*grant*" does not amount

amount to an entire warranty in Equity; nor always at law, as where particular covenants are inserted. *Clarke v. Samson.*

Page 71

WASTE.

1. Courts of Equity will restrain tenants for life, *without impeachment, &c. to a reasonable exercise of their rights.* *Aston v. Aston.* 142
2. A jointress having given leave to the next in remainder for life, without impeachment, &c. to cut timber, the remainderman in tail having acquiesced and encouraged his doing so, the latter was restrained by perpetual injunction from bringing action of waste against the jointress. *Aston v. Aston.* 186
3. A tenant in tail coming into being after a sale of timber by agreement between a tenant for years, *without impeachment of waste, except voluntary waste,* and the ultimate reversioner, entitled to recover against what was received under it by the reversioner. *Garth v. Cotton.* 244
4. As to tenants for life, for years, &c. without impeachment of waste, and *the rights, powers, and duties of trustees to preserve contingent remainders,* *ibid.*

5. It is waste in a Guardian to convert antient pasture into arable land, even for a temporary benefit. *Clark v. Thorp.*

Page 348

WILL.

See also DEVISE, REPUBLICATION, REVOCATION, CONSTRUCTION, &c.

1. See page 29
2. In a suit to establish a will in Equity, *all* the witnesses to it should be examined, or proof given of their deaths, &c. *Ogle v. Cook.* 106
3. Devise in case of testator dying before his return from Ireland. Having returned, &c. the disposition held ineffectual. *Parson v. Lanoe.* 110
4. Issues at law on a forged will, and orders made after the verdict. *Barnesly v. Powel.* 152
5. Republication as to lands purchased after a will, by a codicil made after the purchase. *Gibson v. Lord Montfort.* 214, 215.
6. The word "*testament*" includes all testamentary instruments, as a will, codicils, &c.

The word "*instrument*" held to signify the will alone. *Fuller v. Hooper.* 352

WILLS

WILLS (STATUTE OF).

The statutes of wills *et de donis conditionalibus*, do not extend to the *Isle of Man*.

That Island made unalienable by a private Act of Parliament against heirs general, on failure of issue male.
Bishop of Sodor and Man v. Earl of Derby. Page 377

WINDFALLS.

Windfalls of timber and other casualties, to whom the property belongs. Tenants for life, Remainder-men, &c. *Aston v. Aston.* 175

WITNESS.

See also EVIDENCE, ANSWER, &c.

1. The attestation of articles by a mother, who had suffered the marriage of her daughter to take place *upon an understanding* that she would give 1000*l.* portion, *she knowing the purport of them, is equivalent to her actual signature of them as a party.* *Welford v. Bezely.* 6
2. Though one witness cannot sustain a suit against a distinct denial by answer: *the*

latter must be precise and positive. *Arnott v. Biscoe.* Page 69

3. In a suit to establish a will in equity, *all* the witnesses to it should be examined, or proof given of their deaths, &c. *Ogle v. Cook.* 106

4. A *mere* witness cannot be made a Defendant for discovery of that unto which he is examinable as such. *Plummer v. May.* 196

Vide, however, per Lord Eldon, C. on this case, 7 Ves. 289, 290.

A party cannot examine his own witness on a voir dire. 196

5. As to a witness to a will, who was a creditor, before the act 25 Geo. II. c. 6. *Pryse v. Lloyd.* 221
6. Depositions of a witness being too general, he was directed to be examined upon interrogatories before a Master. *Bishop v. Church.* 303
7. A party to a cause may be examined on new interrogatories in the Master's office without a new Order, the Master being the proper judge. In the case of a witness it is different, for *under a commission* to examine, there must be a new Order for new interrogatories. *Cowslade v. Cornish.* 360

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